In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-735

JOE PENNINGTON,
Petitioner,

vs.

STATE OF KANSAS, MILDA R. SANDSTROM, and F. T. (JIM) CHAFFEE, SHERIFF OF SHAWNEE COUNTY, KANSAS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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November, 1978

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Petitioner Joe Pennington respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Kansas entered in this proceeding on July 21, 1978. Rehearing was denied on September 5, 1978.

OPINION BELOW

The opinion of the Supreme Court of Kansas is reported at 224 Kan. 573, 581 P.2d 812 (1978) and the opinion of the Kansas Court of Appeals is reported at 1 Kan. App. 2d 682, 573 P.2d 1099 (1977). Copies of these opinions appear in Appendix "A" and "B", respectively. An unreported letter opinion of the state district court appears in Appendix "C".

JURISDICTION

The judgment of the Kansas Supreme Court was entered July 21, 1978. A Motion for Rehearing was timely filed, but denied on September 5, 1978. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the First Amendment to the Constitution of the United States confers a conditional privilege on a television news reporter to protect the identity of a confidential informant, who gave a hearsay account of a certain witness' threat upon the life of the ultimate murder victim, where:

(a) The reporter, before the murder trial of the victim's wife, voluntarily disclosed to both the State and counsel for the defendant the entire content of the hearsay information given by the confidential informant;

(b) The State admits disclosure of the identity of the informant was not material and had no bearing on the guilt or innocence of the defendant wife;

(c) The defendant wife, whose sole defense at trial was insanity, made no other effort to discover the identity, advanced no need for such disclosure, and declined to inquire of or cross-examine the witness as to his reported threat on the life of the decedent; and

(d) The trial court's only reason for compelling the reporter to disclose was that the defendant wife was charged "for the most serious of offenses."

2. Whether the due process clause of the Fourteenth Amendment to the Constitution of the United States prohibits the concurrent conviction and sentencing of an individual for direct criminal contempt when the contemptuous act, conviction and sentencing all occur in chambers and are closed to the public.

STATUTORY PROVISIONS INVOLVED

Constitution

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment:

§1. Citizenship; privileges or immunities; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Statutes

Kansas Statutes Annotated, 20-1201, *et seq.*

20-1201. Two classes of contempts. That contempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as hereinafter prescribed.

20-1202. Classes of contempts defined. That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence, are direct contempts. All others are indirect contempts.

20-1203. Direct contempts. That a direct contempt may be punished summarily, without written accusation against the person arraigned, but if the court or judge in chambers shall adjudge him guilty thereof a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon.

STATEMENT OF THE CASE

The action arose from the murder trial of respondent Milda Sandstrom. Mrs. Sandstrom has admitted to, and was convicted of murder for, the May 1977 shooting of her husband. Her defense at trial was insanity. Petitioner was a news reporter who investigated the Sandstrom case for KAKE-TV, Wichita, Kansas. The chronological events are as follows:

1. *April 26 to May 1, 1977 (approximately)*. The deceased, Mr. Sandstrom, was alleged to have attended a party at which his life was threatened by one Paul Winders.

2. *May 3, 1977*. Mr. Sandstrom was fatally shot in the head while sleeping.

3. *May 3, 1977*. Mrs. Sandstrom was arrested and charged with the murder of her husband. She later admitted firing the gun which killed him.

4. *Summer 1977*. Petitioner spoke with a confidential source who claimed to have attended a party several days before the murder, during which Mr. Sandstrom's life was threatened by Mr. Winders. This information was based upon multiple hearsay. The source observed Mr. Winders and Mr. Sandstrom arguing, but could not hear them. The content of the alleged threat was later relayed to the source from another person attending the party, who overheard the argument. This person told the source that Mr. Winders accused Mr. Sandstrom of maintaining a relationship with a young man and that if such relationship was not immediately terminated, Mr. Winders would kill Mr. Sandstrom. (T-23-25, Appendix "D") Petitioner and his employer, KAKE-TV, chose not to broadcast this story.

5. *Summer or Early Fall 1977*. Petitioner voluntarily approached both the attorney for the accused Mrs. Sand-

strom and the District Attorney and told them everything the source had disclosed to him concerning the alleged threat by Mr. Winders—everything except the name of his source. (T-11-12, Appendix "D") Mr. Winders was then a known witness for the prosecution. Notwithstanding this knowledge, *neither counsel for the defendant, nor the State, ever asked Mr. Winders about the party, the argument, or whether he had made the alleged threat, either before or during the trial.*

6. *November 14, 1977.* Jury selection began in the murder trial of Mrs. Sandstrom. A hearing was held before the trial court at which petitioner's information was discussed. Counsel for Mrs. Sandstrom and counsel for the State were present. Petitioner was not present, nor was he aware of the hearing.

7. *November 16, 1977.* Petitioner was subpoenaed to appear and divulge the identity of his confidential news source. The motion was filed by counsel for Mrs. Sandstrom. The State joined in the motion. A hearing was held in chambers, and closed to the public. Petitioner again disclosed the entire content of the communications with his confidential source. However, petitioner refused to disclose the identity of his informant, claiming the same was protected by a conditional First Amendment privilege. (T-11-23, 25-26, 43, Appendix "D")

> Q. (Counsel for Mrs. Sandstrom) During the course of those conversations with either myself or Mr. Feeler, did you disclose to either or both of us that you had an informant who advised you that he had been present at a social gathering in Topeka, Kansas, at a time in which the deceased in this case, Thad Sandstrom's life, had been threatened because of a certain alleged relationship which the deceased was engaged in?

> A. (Petitioner) Yes.
>
> Q. Will you tell me, sir, please, the name of that person or informant?
>
> A. With all due respect to the court, and to you, Mr. Hecht, it is my feeling that the nature of that conversation, as well as the informant's name, is privileged under the First Amendment of the Constitution of the United States, and I must decline to respond to that question. (T-11-12, Appendix "D")

Counsel for Mrs. Sandstrom then asked the court for an order to compel petitioner to disclose his source. Counsel for petitioner argued the First Amendment to the Constitution of the United States protected petitioner from such an order. (T-25-36, Appendix "E") All parties presented arguments, and the hearing adjourned for the court to consider a ruling on the motion to compel.

8. *November 17, 1977.* The trial judge issued a letter opinion holding "there is no constitutionally protected reporter privilege either absolute or conditional," and ordered petitioner to appear and disclose the identity of his confidential source. (Appendix "C")

9. *November 22, 1977.* The prior hearing was reconvened and petitioner was again asked the identity of his source. He replied:

> Mr. Hecht, as I stated at the last hearing in the judge's chambers, I do consider that informant to be privileged by the First Amendment to the United States Constitution. With due respect, I still decline to answer the question. (T-43, Appendix "D")

The court followed by ordering petitioner to disclose his source:

I, likewise, respectfully, am ordering you to divulge at this time the name of your informant. (T-47, Appendix "F")

Mr. Pennington: Yes, sir, Your Honor, and again, with due respect, I, myself, decline. (*Id.*)

The court admonished petitioner that he was subject to criminal contempt of court and asked counsel if there was any reason why petitioner should not be immediately sentenced. Counsel for petitioner responded that his client was entitled to a subsequent full hearing, in open court, before judgment and sentence could be entered. Counsel relied upon this court's prior holdings under the Due Process Clause of the Fourteenth Amendment. (T-47-50, Appendix "F")

The trial court rejected these arguments. It summarily found petitioner in direct criminal contempt of court and sentenced him to sixty (60) days in jail. Petitioner was immediately released on bond.

A direct appeal and an Application for Writ of Habeas Corpus were forthwith filed with the Court of Appeals of the State of Kansas. Petitioner's pleading asserted that the trial court had denied his constitutional rights under the First and Fourteenth Amendments. (Appendices "H" and "G")

10. *November 28 and 29, 1977.* Mr. Winders, the alleged declarant of the threat, testified at Mrs. Sandstorm's murder trial. *Neither the State, nor counsel for respondent Mrs. Sandstrom, questioned Mr. Winders about the alleged threat. Nor did they question him about the supposed party.*

11. Mrs. Sandstrom admitted firing the gun which killed her husband. Her defense was insanity. Petitioner was never called as a witness in the trial.

12. *December 1, 1977.* Petitioner's Writ of Habeas Corpus was denied by the Kansas Court of Appeals. [*In Re Pennington*, 1 Kan. App. 2d 682, 573 P.2d 1099 (1977).]

13. *December 2, 1977.* The Court of Appeals transferred petitioner's direct appeal to the State Supreme Court.

14. *December 9, 1977.* Respondent Mrs. Sandstrom was convicted of murdering her husband.

15. *December 29, 1977.* Petitioner sought review by the State Supreme Court of the Court of Appeals' denial of the Writ of Habeas Corpus.

16. *January 20, 1978.* The direct appeal and the petition for review of the denial of habeas corpus were consolidated for briefing and argument.

17. *June 6, 1978, and June 9, 1978.* The State conceded in its brief, and in oral argument, that it had no interest in disclosure of petitioner's source: ". . . the disclosure of the name of the informant would have no bearing whatever on the guilt or innocence of Mrs. Sandstrom." (p. 18 of State's brief, Appendix "I") (Counsel for Mrs. Sandstrom also evidenced indifference to disclosure by *never* questioning Mr. Winders about the alleged threats—either before or during the trial.) Counsel for Mrs. Sandstrom did not brief or argue this appeal in the appellate courts below.

18. *July 21, 1978.* The Supreme Court of the State of Kansas upheld the conviction of petitioner Joe Pennington. The Supreme Court, in part, reversed the trial court and the State Court of Appeals by finding a limited privilege exists under the First Amendment to protect confidential news sources. But the court concluded the privilege did not apply to petitioner because, although there was no find-

ing the identity of petitioner's source was relevant, the court felt disclosure might lead to relevant evidence. The court also found the conviction and sentencing for direct criminal contempt, in chambers and closed to the public, did not violate petitioner's due process rights under the Fourteenth Amendment.

19. *August 9, 1978.* Petitioner filed jointly a Motion for Rehearing and a Motion for Stay of Mandate in the event the Motion for Rehearing was denied.

20. *September 5, 1978.* The Supreme Court of Kansas denied the rehearing, but ordered its mandate withheld for issuance until November 5, 1978. (Appendix "J")

REASONS FOR GRANTING THE WRIT

(A) There is Uncertainty Among Numerous State and Federal Courts As to When, and Under What Circumstances, a Court Should Require a News Reporter to Disclose the Identity of a Confidential News Source in a Manner Compatible With the First Amendment to the Constitution of the United States Where the Information Supplied by the Source Has Been Previously Disclosed to All Parties.

This is not the typical case of a reporter seeking protection of a confidential source under the First Amendment. It is not *Branzburg* v. *Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972). It is not *State* v. *Jascalevich, In Re Farber*, ... N.J. ....., No. A/78/79/80, Sept. 21, 1978. Petitioner emphasizes he is not an eyewitness to criminal activity, nor does he possess information material or relevant to the guilt or innocence of a defendant. Petitioner is a news reporter who had voluntarily disclosed the information relayed by his source. However, he was still ordered to disclose the identity of his confidential source even though the parties seeking disclosure admitted by both word and action that disclosure of the source would have no bearing whatsoever on the guilt or innocence of the defendant.

A trial judge today has no definitive standards to apply when deciding this narrow question of when a news reporter should be required to disclose the identity of a confidential *source* where the information held by that source is already known to the parties seeking disclosure.

This court addressed one segment of the question in *Branzburg* v. *Hayes, supra.* In the *Branzburg* trilogy, this

court held that three news reporters, *who were either eyewitnesses to alleged criminal activity or had interviewed suspected criminals,* could not ignore grand jury subpoenas, and were thus required to appear and testify in response to such subpoenas. However, the decision in *Branzburg* did not pronounce a definitive standard which trial judges can apply to claims of confidentiality where the need for disclosure of the sources is less obvious than it was in the *Branzburg* cases. The question "has been a continuing source of controversy and litigation in both state and federal courts." [*Gideon* v. *Wainwright*, 372 U.S. 335, 338, 9 L.Ed.2d 799, 801, 83 S.Ct. 792, 793 (1963).]

The majority of jurisdictions addressing this question of confidentiality find a news reporter enjoys a conditional privilege under the First Amendment to withhold the identity of confidential sources. The authority supporting this conditional privilege is often *Branzburg, supra.* [*But see In Re Disclosure of Grand Jury Report,* ..... F.Supp. ..... (S.D. Fla. 1977).]

These courts have required a reporter to disclose the source if the party seeking disclosure can show the identity of the source is *relevant* or *material* to the issues before the court. The jurisdictions adopting this requirement are: Second,[1] Fifth,[2] Eighth,[3] Ninth,[4] and Tenth[5] Circuit

1. *Baker* v. *F&F Investment*, 470 F.2d 778 (2nd Cir. 1972), cert. den., 411 U.S. 966 (1973).

2. *Poirier* v. *Carson*, 537 F.2d 823 (5th Cir. 1976), reh. den., 541 F.2d 281 (1976).

3. *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), cert. den., 409 U.S. 1125 (1973).

4. *United States* v. *Pretzinger*, 542 F.2d 517 (9th Cir. 1976); *Farr* v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975), cert. den., 427 U.S. 912 (1976). See, *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972), reh. den., Oct. 5, 1972.

5. See, *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

Courts of Appeal; the Court of Appeals for the District of Columbia;[6] the Federal District Courts for the Eastern District of Virginia,[7] the Eastern District of New York,[8] and the District of Columbia;[9] and the state appellate courts of California,[10] Connecticut,[11] Florida,[12] Kansas,[13] New Mexico,[14] New York,[15] Vermont,[16] Virginia,[17] and Wisconsin.[18] But even these courts have produced a variety of inconsistent rules and standards. One jurisdiction has noted the majority opinion in *Branzburg* held "the press has a First Amendment right of *uncertain dimensions* to gather news and to not disclose sources. . ." [*Rosato* v. *Superior Court of*

6. *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir. 1974), petition for writ of certiorari dismissed, 417 U.S. 938 (1974).

7. See, *Gilbert* v. *Allied Chemical Corp.*, 411 F.Supp. 505 (E.D. Va. 1976).

8. See, *Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D. N.Y. 1975).

9. *Anderson* v. *Nixon*, 444 F.Supp. 1195 (D. D.C. 1978). See, *Democratic National Committee* v. *McCord, In Re Bernstein*, 356 F.Supp. 1394 (D. D.C. 1973).

10. *Rosato* v. *Superior Court of Fresno County*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), cert. den., 427 U.S. 912 (1976).

11. *Connecticut State Board of Labor Relations* v. *Fagin*, 33 Conn. Sup. 204, 370 A.2d 1095 (1976); *Goldfeld* v. *Post Publishing*, Conn. Supr. Ct., No. 168062, July 11, 1978, 4 Med. L. Rptr. 1167.

12. *Morgan* v. *State*, 337 So.2d 951 (Fla. 1976), reh. den., Oct. 27, 1976.

13. *State* v. *Sandstrom, In Re Pennington*, 224 Kan. 573, 581 P.2d 812 (1978).

14. See, *Ammerman* v. *Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1258 (1977), cert. den., Dec. 27, 1977.

15. See, *People* v. *Marahan*, 368 N.Y.S.2d 685, 81 Misc.2d 637 (1975).

16. *State* v. *St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974).

17. *Brown* v. *Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974), cert. den., 419 U.S. 966 (1974).

18. *Zelenka* v. *Wisconsin*, 83 Wis.2d 601, 266 N.W.2d 279, (1978).

Fresno County, 51 Cal. App. 3d 190, 213, 124 Cal. Rptr. 427, 442, cert. den., 427 U.S. 912 (1976).] (Emphasis supplied.)

1. Jurisdictions disagree among themselves over what degree of relevancy or materiality must be shown. Some have required the party seeking disclosure to prove a "compelling state interest" or a "compelling need" for the identity of the informant in order to satisfy the requirements of relevancy and materiality. [See, *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972), reh. den., Oct. 5, 1972; *Gilbert* v. *Allied Chemical Corp.*, 411 F.Supp. 505 (E.D. Va. 1976).] Some require a showing that disclosure of the source will lead to "persuasive evidence" on the issue before the court. (*Carey* v. *Hume, supra; Ammerman* v. *Hubbard Broadcasting, Inc., supra.*) Other courts have found the relevancy test is met if the identity of the source "goes to the heart of the matter" before the court. [*Baker* v. *F&F Investment*, 470 F.2d 778 (2nd Cir. 1972), cert. den., 411 U.S. 966 (1973); *Anderson* v. *Nixon*, 444 F.Supp. 1195 (D. D.C. 1978); and *Connecticut State Board of Labor Relations* v. *Fagin*, 33 Conn. Sup. 204, 370 A.2d 1095 (1976). See, *Silkwood* v. *Kerr-McGeen Corp.*, 563 F.2d 433 (10th Cir. 1977); *Jenoff* v. *Hearst Corporation*, 453 F.Supp. 541 (D.C. Md. 1978); and *Richards of Rockford, Inc.* v. *Pacific Gas & Electric*, 71 F.R.D. 388 (N.D. Cal. 1976).]

To the contrary, the court below created a more liberal definition for relevancy: "Relevant evidence in discovery may include information which is not admissible at trial, but which appears to be reasonably calculated to lead to the discovery of admissible evidence." (*State* v. *Sandstrom, In Re Pennington*, 224 Kan. at 577, 581 P.2d at 815-16, Appendix "A".) The Kansas Supreme Court never mentioned how disclosure of petitioner's source appeared "to be reasonably calculated to lead to the discovery of admissible evidence." In fact, the court below carefully

avoided finding whether the identity of petitioner's source was relevant.

Similar conflict lies among the jurisdictions when disclosure of only confidential *information* is sought. ("Compelling state interest" or "compelling need": *Gulliver's Periodicals* v. *Levy*, ... F.Supp. ..... (N.D. Ill. Sept. 7, 1978), 4 Med. L. Rptr. 1342; *Loadholtz* v. *Fields*, 389 F.Supp. 1299 (M.D. Fla. 1975); *Winegard* v. *Oxberger*, ... Iowa ....., 258 N.W.2d 847 (1977), cert. den., No. 77-1276, May 15, 1978; *Florida* v. *Hurston*, Fla. Cir. Ct. No. 77-518, Mar. 17, 1978, 3 Med. L. Rptr. 2295. "Heart of the matter": *Gulliver's Periodicals* v. *Levy, supra.*)

2. Many courts also require the party seeking disclosure of a confidential source to demonstrate the identity cannot be obtained from "alternate sources." (*Connecticut State Board of Labor Relations* v. *Fagin, supra; State* v. *St. Peter, supra; Brown* v. *Commonwealth, supra;* and *Goldfeld* v. *Post Publishing*, Conn. Supr. Ct., No. 168062, July 11, 1978, 4 Med. L. Rptr. 1167. *See, Silkwood* v. *Kerr-McGee Corp., supra*; *Bursey* v. *United States, supra; Gilbert* v. *Allied Chemical Corp., supra*; *Apicella* v. *McNeil Laboratories, Inc. supra*; and, *Democratic National Committee* v. *McCord, In Re Bernstein, supra.*)

These rulings conflict with at least one jurisdiction which has ruled that a showing of a lack of alternate sources is not a precondition to compelled disclosure of a confidential source. (*Rosato* v. *Superior Court of Fresno County, supra.*) The court below did not address itself to the question of "alternate sources," although this criterion was presented to the court by brief and argument.

Some jurisdictions require a showing of alternate sources before disclosure of confidential *information* will be compelled. (*Gulliver's Periodicals* v. *Levy, supra*; *Flor-*

ida v. *Hurston, supra*; and *MacKay* v. *Driscoll*, N.Y. Supr. Ct., No. 9926, June 6, 1978, 3 Med. L. Rptr. 2582.)

3. There is also uncertainty as to whether first the trial court alone should be given the identity of the confidential source *in camera* before deciding whether the privilege applies. In most jurisdictions of which petitioner is aware, the trial court will decide whether disclosure of the source will be ordered to opposing parties without knowledge of the identity of that person. When disclosure is made, the court and opposing counsel all learn the identity of the confidential source concurrently. Such was the procedure in the trial court below.

However, statutory law in New Mexico presents a trial judge with another option. The court may first order disclosure *in camera*. Thereafter, a judge can decide whether such information is sufficiently relevant to the issues before the court as to necessitate full disclosure to all parties. (*Ammerman* v. *Hubbard Broadcasting, Inc., supra.*)

A similar step was required under state law in the recent case of *State* v. *Jascalevich, In Re Farber, supra.* However, this action concerned the broader question of confidential *information.* There the trial court first decided the information sought appeared on its face to be "necessary and material." The reporter was then ordered to disclose the information, *in camera,* for the trial judge's inspection only. Thereafter, a full hearing was planned to again consider the question of materiality before disclosure would be made to opposing counsel. (See, *Florida* v. *Hurston, supra.*)

4. Finally, the holdings of the supreme courts of the states of Idaho and Massachusetts conflict with all of the above cited jurisdictions. These two jurisdictions have

held a reporter enjoys no privilege, either absolute or conditional, to withhold the identity of a confidential source. (*Caldero* v. *Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, cert. den., 434 U.S. 930 (1977); and *Dow Jones* v. *Superior Court,* 364 Mass. 317, 303 N.E.2d 847 (1973).) [See, *In Re Bridge,* 120 N.J. Super. 460, 295 A.2d 3 (1972), cert. den., 410 U.S. 991 (1973) as to confidentiality of information.]

(B) The Decision Below Conflicts With This Court's Holding in *Branzburg* v. *Hayes, supra.* One common thread runs through all of the *Branzburg* opinions (excepting that of Justice Douglas): A reporter can only be ordered to disclose information which is relevant to the issues before the court. Writing for the plurality in *Branzburg,* Justice White noted:

> The obligation to testify in response to grand jury subpoenas will not threaten these sources not involved with criminal conduct and without information *relevant* to grand jury investigations, and we cannot hold that the Constitution places the sources in these two categories either above the law or beyond its reach. (408 U.S. at 699, 33 L.Ed.2d at 650.) (Emphasis supplied.)

Justice Stewart, with whom Justice Brennan and Justice Marshall joined, wrote in his dissenting opinion:

> Governmental officials must, therefore, demonstrate that the information sought is *clearly* relevant to a *precisely* defined subject of governmental inquiry. [Citations omitted.] They must demonstrate that it is reasonable to think the witness in question has that information. [Citations omitted.] And they must show that there is not any means of obtaining the

information less destructive of First Amendment liberties. (408 U.S. at 740, 33 L.Ed.2d at 674-75.)

The concurring opinion of Justice Powell required a balancing of the right of freedom of the press against "the obligation of all citizens to give *relevant* testimony with respect to criminal conduct." (408 U.S. at 710, 33 L.Ed.2d at 656.) (Emphasis supplied.)

In this action, the Supreme Court of Kansas recognized the balancing test advocated by Justice Powell in *Branzburg, supra.* However, Petitioner asserts the court below erroneously applied the test because there was absolutely no showing of relevancy in the identity of petitioner's confidential source. The finding below is also inconsistent with the other *Branzburg* opinions because of this total absence of relevancy in the information sought.

The trial court specifically held "no constitutionally protected reporter privilege either absolute or conditional, which permits his refusal to divulge the name of his informant" was recognized under *Branzburg, supra.* (Appendix "C".) The trial court then speculated that:

> . . . if the Court were to do the balancing as suggested by Justice Powell between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct, suffice is [sic] to say that under the factual situation in this case we have a defendant on trial for the most serious of offenses and that the information herein sought using the balance of interests as suggested by Mr. Pennington would still require his disclosure of the source of his information. (*Id.*)

The only reason given by the trial court for ordering disclosure was "we have a defendant on trial for the most

serious of offenses." (*Id.*) This reasoning directly controverts the opinion by the Kansas Supreme Court:

> While courts recognize that a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case, that fact in and of itself does not automatically require disclosure in a criminal case. . . Nor does the privilege evaporate because the defendant is charged with murder. (*State* v. *Sandstrom, In Re Pennington,* 224 Kan. at 576, 581 P.2d at 815, Appendix "A".)

Nonetheless, the Kansas court affirmed the conviction because it could not find the trial court abused its discretion in ordering disclosure. The Supreme Court noted the action was in the nature of a discovery proceeding and that the information sought did not have to be relevant, but could be ordered disclosed if it might reasonably lead to discovery of relevant evidence. (*Id.*, 224 Kan. at 576-77, 581 P.2d at 815-16.) But the court below did not state how the identity of petitioner's source could "reasonably lead" to relevant evidence.

Petitioner asserts the court below erred because neither counsel for the state, nor counsel for the defendant, could show the need for disclosing the identity of petitioner's source. The state conceded in its brief and in oral argument that the identity of petitioner's source was immaterial: ". . . *the disclosure of the name of the informant would have no bearing whatever on the guilt or innocence of Mrs. Sandstrom.*" (p. 18 of the State's brief, Appendix "I") (Emphasis supplied.)

The conduct of counsel for the respondent Mrs. Sandstrom manifests a belief that the identity of petitioner's source was irrelevant and immaterial. Mr. Winders was the declarent of the alleged threat. *If counsel for Mrs.*

Sandstrom felt the circumstances surrounding this alleged threat were relevant to the defense of his client, he would have asked Mr. Winders whether he made the threat. But counsel never asked Mr. Winders whether he made the alleged threat. He forwent his opportunity to question the alleged declarent. How can he then claim the identity of a person, who was told of the threat by yet another person, is relevant to his client's defense? He cannot. In fact, Mr. Winders later testified at trial, but was never asked if he made the alleged threat. This lack of materiality is further evidenced by counsel for Mrs. Sandstrom choosing not to brief and argue this appeal in the courts below.

Justice Fromme, in his dissenting opinion below, recognized the absence of any need for compelling disclosure of petitioner's source:

> At the hearing on the motion to compel disclosure the petitioner testified as to the approximate date, time, and place of the gathering at which a state's witness had threatened to kill Thad Sandstrom. I fail to see how the name of the newsman's informant, who had not actually heard the threat but had been told of it by someone else, could possibly have any materiality in proving some element of the defense of insanity, in reducing the gradation of the offense charged, or in mitigating the possible sentence to be imposed. The information sought was not, in my opinion, material to the defense in the case and did not justify the trial court's action in refusing to recognize the limited privilege, finding the newsman in contempt of court, and sentencing him to sixty days in jail. (*State* v. *Sandstrom, In Re Pennington*, 224 Kan. at 578, 581 P.2d at 816, Fromme, dissenting, Appendix "A".)

Petitioner is compelled to distinguish his case from the well-known holdings in *Branzburg* v. *Hayes, supra,* and *State* v. *Jascalevich, In Re Farber, supra.*

The *Branzburg* trilogy concerned reporters who were either eyewitnesses to criminal conduct or had interviewed suspected criminals. These reporters were ordered to appear and testify before grand juries because the information they possessed appeared relevant and material to the respective investigations.

In *Farber,* the investigatory work of the reporter triggered the eventual arrest of the defendant. Unlike the present case, the reporter in *Farber* withheld confidential *information.* That reporter had conducted his investigation, in part, with the cooperation of the prosecution. Some of his sources were known, but their information was confidential. The defendant was unable to question at least two sources because one was dead and the other refused to speak with counsel for defense. The *information* was, on its face, material to the guilt or innocence of the defendant. In denying an application for stay of mandate, Justice White notes in his second opinion:

> There is no present authority in this Court either that newsmen are constitutionally privileged to withhold duly subpoenaed documents *material to the prosecution or defense of a criminal case* or that a defendant seeking the subpoena must show extraordinary circumstances before enforcement against newsmen will be had. Cf. *Branzburg* (*New York Times* v. *Jascalevich,* Justice White, den. of App. for Stay, 47 U.S.L.W. 3066, 3067, Aug. 1, 1978.) (Emphasis supplied.)

Mrs. Sandstrom admitted shooting her husband. The information held by petitioner was only the name of a person, who was told by yet another person, of a threat upon

Mr. Sandstrom—a threat which neither the state, nor counsel for defendant, sought to confirm or deny from the alleged declarant. Unlike the information sought in *Branzburg, supra,* and *Farber, supra,* petitioner's information was collateral and had no bearing whatsoever on the guilt or innocence of the defendant. There was no need for disclosure.

Petitioner concurs with the majority opinion of the New Jersey Supreme Court in the *Farber* case, *supra*:

> . . . despite the holding in *Branzburg,* those who gather and disseminate news are by no means without First Amendment protections. Some of these are referred to by Justice White in the *Branzburg* opinion. *See* 408 U.S. at 681-2, 33 L.Ed.2d at 639-40. They include, among others, the right . . . to refrain from revealing its sources except upon legitimate demand. Demand is not legitimate when the desired information is patently irrelevant to the needs of the inquirer or his needs are not manifestly compelling. (*In Re Farber, supra,* slip opinion at pp. 9-10.)

(C) The Decision Below, Convicting Petitioner of Direct Criminal Contempt, Conflicts With This Court's Holdings in *In Re Oliver,* 333 U.S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1947); *Cooke* v. *United States,* 267 U.S. 517, 69 L.Ed. 767, 45 S.Ct. 390 (1925) and *In Re Ferris,* 175 Kan. 704, rev., 348 U.S. 933, 99 L.Ed. 732, 75 S.Ct. 355 (1955).

This court has ruled under the Fourteenth Amendment that upon the occurrence of some contemptuous act, a court may summarily convict and sentence the defendant if the proceedings were (1) in open court, *and* (2) demoralizing of the court's authority before the public.

> The narrow exception to these due process requirements [full hearing] includes *only* charges of misconduct, *in open court,* in the presence of a judge, which

> disturbs the court's business . . . *and* where *immediate punishment is essential to prevent "demoralization of the court's authority" before the public.* [*Re Oliver,* 333 U.S. 257, 276, 92 L.Ed. 682, 695 (1947), following *Cooke* v. *United States,* 267 U.S. 517, 69 L.Ed. 767 (1925).] (Emphasis supplied.)

The proceeding before the trial court transpired on two separate days. On November 16, 1977, the court heard arguments concerning whether disclosure should be ordered. The court stated: "The court will find that the matters involved in the arguments are such that they should be heard by the court *in camera,* in chambers, out of the presence of the public generally; so we will be in recess at this time." (T-18-19, Appendix "K".)

The court thereafter ruled by a letter opinion that petitioner must disclose his source. (Appendix "C".) Petitioner was ordered to appear on November 22, 1977, and to again reveal the identity of his source. Petitioner appeared, but refused to disclose his source. The court convened by noting that "we're in chambers." (T-41, Appendix "L".) The hearing of November 22, 1977, was a continuance of the November 16, 1977, proceeding. The public and press were excluded from the trial court's chambers. The record does not contradict this. Respondents do not contradict this.

Petitioner's refusal of disclosure, resulting conviction for direct criminal contempt, and sentencing all occurred in chambers and out of the view of the public—not in open court. This was done for the express purpose of keeping the matter from the public. The Kansas Supreme Court held:

> Although the proceedings were *in camera* and closed to the public, the acts of petitioner were reported to

> the public almost instantly and were as demoralizing to the authority of the court *as if they had taken place in an open courtroom*. Furthermore, there is no evidence in the record to indicate that the November 22, 1977, proceedings, wherein petitioner was again asked to reveal the identity of the informant, were not in "open court," although conducted in chambers. (224 Kan. at 577, 581 P.2d at 816, Appendix "A".) (Emphasis supplied.)

The opinions in *Cooke, supra*, and *Oliver, supra*, clearly hold that the Fourteenth Amendment will not tolerate a summary conviction and sentencing for contempt which does not occur in open court. This court has previously reversed the Kansas Supreme Court on the same question by per curiam opinion in *In Re Ferris, supra*. The reversal relied upon *Re Oliver, supra*. This due process standard of "openness" was not satisfied below upon the second-hand transmittal of the events to the public. The Kansas Supreme Court ignored the holdings in *Cooke, supra*, and *Oliver, supra*, and failed to even mention the same. The decision below clearly flaunts the Fourteenth Amendment safeguards previously established by this Court.

Finally, the State argued in its brief that the trial court's conviction and sentencing of direct contempt in chambers, and not in open court, transpired under the statutory procedure set forth in Kansas Statutes Annotated 20-1201, *et seq.*:

> That a direct contempt may be punished summarily, without written accusation against the person arraigned, but if the court or judge in chambers shall adjudge him guilty thereof a judgement shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon. (K.S.A. 20-1203.)

The court below did not mention this statute in its opinion. Petitioner merely asserts that if the State's position is credible, then this statute would appear to conflict with the due process requirements established by the United States Supreme Court as discussed above. The statute would thereby be unconstitutional either on its face, or in its application to the facts.

CONCLUSION

For these reasons, the writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Kansas.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

No. 49,268

STATE OF KANSAS, *Plaintiff-Appellee*, v. MILDA R. SANDSTROM, *Defendant-Appellant*, IN RE THE APPLICATION OF JOE PENNINGTON.

No. 49,660

IN THE MATTER OF THE APPLICATION OF JOE PENNINGTON FOR A WRIT OF HABEAS CORPUS, *Petitioner-Appellant*, v. F. T. (JIM) CHAFFEE, SHERIFF OF SHAWNEE COUNTY, KANSAS, *Respondent-Appellee*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Newsperson's Limited Privilege of Confidentiality—Application.* A newsperson has a limited privilege of confidentiality of information and identity of news sources. The existence of the privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter's need for confidentiality.

2. CRIMINAL LAW—*Discovery—Scope of Relevancy in Discovery Proceeding.* The scope of discovery is to be liberally construed so as to provide the parties with information essential to litigation to insure defendant a fair trial; therefore, the scope of relevancy in a discovery proceeding is broader than the scope of relevancy at trial. Relevant evidence in discovery may include information which is not admissible at trial, but which appears to be reasonably calculated to lead to the discovery of admissible evidence.

3. APPEAL AND ERROR—*Abuse of Discretion of Trial Judge—Scope of Review.* To find the trial court abused its discretion an appellate court must determine that no reasonable person could take the view adopted by the trial court.

Appeal from Shawnee district court, division No. 3; E. NEWTON VICKERS, judge. Opinion filed July 21, 1978. Affirmed.

Robert Hall, of Adams, Jones, Robinson and Malone, Chartered, of Wichita, and *Carl C. Monk,* of the New York bar, argued the cause, and were on the brief for the appellant.

Frank Yeoman, assistant district attorney, argued the cause, and *Curt T. Schneider,* attorney general, and *Gene M. Olander,* district attorney, were on the brief for the appellee.

Carl C. Monk was on the brief of the American Civil Liberties Union of Kansas as *amicus curiae.*

Gerrit H. Wormhoudt, of Wichita, was on the brief of the Wichita Eagle & Beacon Publishing Co., Inc., as *amicus curiae.*

Michael D. Gragert and *Russell W. Davisson* of Wichita, were on the brief of the Society of Professional Journalists, Sigma Delta Chi, as *amicus curiae.*

The opinion of the court was delivered by

OWSLEY, J.: This is an appeal from the trial court's finding that petitioner Joe Pennington, a news reporter, was in direct criminal contempt for refusing to disclose the identity of a confidential news source. Petitioner filed a direct appeal and a petition for writ of habeas corpus in the court of appeals. The writ was denied. (*In re Pennington,* 1 Kan. App. 2d 682, 573 P.2d 1099 [1977].) Petition for review was granted by this court and upon motion the petition and direct appeal were consolidated for decision.

The issue on review is whether a news reporter has a First and Fourteenth Amendment privilege to protect the identity of a confidential news source.

This controversy arises from a murder case. On May 3, 1977, Thad Sandstrom, a nationally recognized broadcast executive, was found shot to death in his Topeka home. Shortly thereafter, his wife, Milda, was charged with first degree murder. The case came to jury trial on November 14, 1977. At the beginning of trial her defense counsel filed a motion with the trial court to compel petitioner to reveal the identity of a confidential news source. On November 16, petitioner appeared in response to a subpoena. A motion to quash the subpoena was denied.

Under questioning, petitioner revealed that he came to Topeka from Wichita after the Sandstrom murder to investigate a possible story. While in Topeka he came in contact with his confidential news source, the informant, who told petitioner he had been at a party shortly before Sandstrom's death where a state's witness in the Sandstorm murder trial had threatened to kill Sandstrom. The informant, although present at the party, had not actually heard the threat but had been told of it by someone who had heard the threat. Although petitioner testified as to the approximate date, time, and place of the gathering, he refused to divulge the identity of his informant. Petitioner was found in direct criminal contempt of court and sentenced to sixty days in jail.

The trial court rule that in a criminal case the petitioner did not have a privilege to refuse to disclose the identity of an informant and, even if he had a limited priv-

ilege, the need for the information outweighed petitioner's privilege of confidentiality.

We believe a newsperson has a limited privilege of confidentiality of information and identity of news sources, although such does not exist by statute or common law. The United States Supreme Court recognized the privilege in *Branzburg v. Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972). That decision was a review of a trilogoy of cases. In *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970), a reporter wrote a story describing his observation of two persons making hashish. As a condition to observing the process the two demanded confidentiality. A grand jury investigating drug traffic subpoenaed the reporter and demanded the names of the two persons. The case of *In re Pappas*, 358 Mass. 604, 266 N.E.2d 297 (1971), involved a news reporter who had witnessed civil disturbances while investigating a news story inside a Black Panthers headquarters. When summoned to appear before the grand jury he refused to divulge what he had seen while inside the headquarters, including the identity of the persons he had observed. The last case, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), arose from a grand jury investigation of numerous crimes, including threats against the President of the United States, mail fraud, and interstate travel to incite a riot. Again, the news reporter had been assigned to cover Black Panther activities and had witnessed the alleged violations.

The majority opinion in *Branzburg* was written by Mr. Justice White, who was joined by three other justices. In its holding the court recognized the importance of the free flow of information to insure the viability of the freedom of the press, but recognized that a grand jury may require a news reporter to give testimony on all relevant matters which the grand jury is investigating, just as any other

citizen is required to do. In a concurring opinion, Mr. Justice Powell sought to explain the holding of the majority, stating:

> ". . . The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." (p. 710.)

Courts applying *Branzburg* to criminal cases have generally concluded that the proper test for determining the existence of a reporter's privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter's need for confidentiality. (*United States v. Pretzinger*, 542 F.2d 517, 520 [9th Cir. 1976]; *United States v. Liddy*, 478 F.2d 586, 587 [D.C. Cir. 1972]; *United States v. Orsini*, 424 F. Supp. 229, 232 [E.D.N.Y. 1976], aff'd 559 F.2d 1206 [2d Cir. 1977], cert. denied ..... U.S. ....., 54 L.Ed.2d 491, ... S.Ct. .....; *United States v. Liddy*, 354 F. Supp. 208, 215 [D.C. Cir. 1972]; *Rosato v. Superior Court of Fresno County*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 [1975], cert. denied 427 U.S. 912, 49 L.Ed.2d 1204, 96 S.Ct. 3200 [1976]; *Farr v. Superior Court, County of Los Angeles*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 [1971], cert. denied 409 U.S. 1011, 34 L.Ed.2d 305, 93 S.Ct. 430 [1972]; *Morgan v. State*, 337 So.2d 951, 954 [Fla. 1976]; *Morgan v. State*, 325 So.2d 40, 43 [Fla. App. 1975]; *People v. Marahan*, 81 Misc. 2d 637, 368 N.Y.S.2d 685 [1975].) Whether a defendant's need for the confidential information or the identity of its source outweighs the reporter's privilege depends on the facts of each case. As a general rule, disclosure has been required only in those

criminal cases where it is shown the information in possession of the news reporter is material to prove an element of the offense, to prove a defense asserted by the defendant, to reduce the classification or gradation of the offense charged, or to mitigate or lessen the sentence imposed. When the information sought has a bearing in one of these areas, the newsperson's privilege must yield to the defendant's rights to due process and a fair trial. (See, *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 [1974]; *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 [1974], cert. denied 419 U.S. 966, 42 L.Ed.2d 182, 95 S.Ct. 229.)

While courts recognize that a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case, that fact in and of itself does not automatically require disclosure in a criminal case. If that were true, no privilege would exist for a news reporter summoned in a criminal case. Nor does the privilege evaporate because the defendant is charged with murder. The proper test enunciated by the *Branzburg* majority is whether the information sought is relevant to the issues before the tribunal. Mr. Justice Powell's concurring opinion and the vast majority of criminal cases since *Branzburg* dealing with this issue recognize this feature as a primary requirement, but further suggest a test of balancing the need of the defendant for the information or the identity of the news source against the privilege of the news reporter. The trial court in this case stated that if the balancing test were applied, the need for the information outweighed the news reporter's privilege of confidentiality.

In reviewing the action of the trial court, we are cognizant the procedure used was *in camera* and in the nature of discovery by the defendant. The scope of discovery is to be liberally construed so as to provide the parties with information essential to litigation to insure defendant a

fair trial; therefore, the scope of relevancy in a discovery proceeding is broader than the scope of relevancy at trial. Relevant evidence in discovery may include information which is not admissible at trial, but which appears to be reasonably calculated to lead to the discovery of admissible evidence. If the information sought meets that test then the fact the information sought is inadmissible at the trial is immaterial.

We should not disturb the ruling of the trial court unless the record clearly shows the information sought is not relevant to the defense or could not lead the defendant to information relevant to her defense. We cannot say whether knowledge of the identity of the informant would lead to information relevant to her defense. The trial court apparently felt this was a possibility and ruled against petitioner. To find the trial court abused its discretion, an appellate court must determine that no reasonable person could take the view adopted by the trial court. (*Stayton v. Stayton*, 211 Kan. 560, 562, 506 P.2d 1172 [1973].) This we cannot do; therefore, we uphold the trial court in ordering petitioner to reveal the identity of the informant.

Petitioner also challenges the validity of the contempt citation. He argues the citation is invalid because the acts constituting the contempt did not take place in "open court"; thus, they do not amount to direct acts of contempt. We disagree. Although the proceedings were *in camera* and closed to the public, the acts of petitioner were reported to the public almost instantly and were as demoralizing to the authority of the court as if they had taken place in an open courtroom. Furthermore, there is no evidence in the record to indicate that the November 22, 1977, proceedings, wherein petitioner was again asked to reveal the identity of the informant, were not in "open

court", although conducted in chambers. (*Morris v. State*, 2 Kan. App. 2d 34, 573 P.2d 1130 [1978].)

Finally, petitioner argues he should not be found in contempt because he relied in "good faith" on assertion of a constitutional privilege. We do not agree. The determination of the existence of a privilege is a question for the trial court to determine, not the petitioner. The court found no privilege under the facts of this case and ordered petitioner to answer the questions, knowing that failure to do so would lead to a contempt citation. Petitioner's decision not to answer was voluntary and he knew the consequences of his refusal.

The judgment of the trial court is affirmed.

FROMME, J., dissenting. The proper test for determining the extent of a reporter's privilege of confidentiality of information and news sources in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter's need for confidentiality. This is the test adopted by the majority of this court based upon *Branzburg v. Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972).

A disclosure of information and news services should be required only in those cases where it is shown the information in possession of the news reporter is material to prove some element of the defense, to reduce the gradation of the offense charged, or to mitigate the possible sentence to be imposed.

The defense of Milda R. Sandstrom in the murder case was insanity.

At the hearing on the motion to compel disclosure the petitioner testified as to the approximate date, time, and place of the gathering at which a state's witness had threat-

ened to kill Thad Sandstrom. I fail to see how the name of the newsman's informant, who had not actually heard the threat but had been told of it by someone else, could possibly have any materiality in proving some element of the defense of insanity, in reducing the gradation of the offense charged, or in mitigating the possible sentence to be imposed. The information sought was not, in my opinion, material to the defense in the case and did not justify the trial court's action in refusing to recognize the limited privilege, finding the newsman in contempt of court, and sentencing him to sixty days in jail.

MILLER, J., concurring and dissenting: I concur with the majority opinion; however, I believe that the imposition of a sentence of confinement for a fixed period of time is improper. Confinement until compliance with the order of the court is, in my judgment, the appropriate disposition in such cases.

APPENDIX "B"

No. 49,660

IN THE MATTER OF THE APPLICATION OF JOE PENNINGTON FOR A WRIT OF HABEAS CORPUS, JOE PENNINGTON, *Plaintiff*, v. F. T. JIM CHAFFEE, Sheriff of Shawnee County, Kansas, *Respondent*.

Petition for review granted January 20, 1978.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*News Reporter's Testimonial Privilege—Criminal Proceeding*: Neither the federal or the state constitutions nor the common law provide a testimonial privilege for a news reporter to withhold testimony in a criminal proceeding.

2. SAME—*Contempt—Summary Procedure—Due Process*. No due process right is violated by summary procedure in a contempt matter when the contempt occurs in open court in the presence of the judge and it interferes with the orderly conduct of the proceedings.

Original proceeding in habeas corpus. Opinion filed December 1, 1977. Denied.

Robert Hall, of Adams, Jones, Robinson & Malone, of Wichita, *Ronald F. Loewen*, of Wichita, and Jack C. Landau, of Washington, D.C., for the plaintiff.

Gene M. Olander, district attorney, for the respondent.

Per Curiam: The petition filed herein alleges that the plaintiff, a news reporter, was, in violation of the first amendment to the United States constitution, found guilty of direct criminal contempt of court for his refusal to give

answers to questions propounded to him as a witness in a criminal proceeding in the district court of Shawnee county, Kansas, which answers would have revealed privileged information and further that he was illegally confined and restrained of his liberty as punishment for such contempt.

Upon consideration of the petition with attached memorandum and the answer by respondent, this court, pursuant to Rule 9.01(*e*), denies the requested relief for the reason the first amendment to the federal constitution provides no testimonial privilege for a news reporter to withhold testimony in a criminal proceeding nor is there any such common law privilege (*Branzburg v. Hayes*, 408 U.S. 665, 33 L. Ed.2d 626, 92 S.Ct. 2646 [1972]). We do not interpret Bill of Rights § 11 to our own constitution to supply this privilege. If any such privilege is to exist, it must come from the legislature of the state of Kansas.

No due process right is violated by summary procedure in a contempt matter when the contempt occurs in open court in the presence of the judge and it interferes with the orderly conduct of the proceedings (*Cooke v. United States*, 267 U.S. 517, 69 L.Ed. 767, 45 S.Ct. 390 [1925]).

APPENDIX "C"

DISTRICT COURT OF KANSAS
THIRD JUDICIAL DISTRICT
Shawnee County, Kansas

Chambers of
E. Newton Vickers
Judge of the District Court
Division No. Three
Shawnee County Courthouse
Topeka, Kansas 66603

Officers:
Arthur E. Halleran, C.S.R.
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November 17, 1977

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Mr. Mark Bennett
Special Prosecutor
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Topeka, Kansas 66603

Re: State of Kansas v. Milda R. Sandstrom
Case #77CR546

Gentlemen:

Please be advised that the Court has carefully considered the Motion to Quash Subpoena issued to Mr. Pennington out of this Court in the above entitled matter and the arguments of counsel in connection therewith, as well as the record of the testimony at the hearing held by the Court in chambers on November 16, 1977, and in regard thereto makes the following decision.

The facts herein are set forth in the record and the matter arises upon the refusal of Mr. Pennington, an investigative reporter for Station KAKE in Wichita, to divulge the name of an informant as requested by the defense in the above entitled case.

Mr. Pennington takes the position that the First Amendment to the Constitution of the United States protects him from divulging his source and in support thereof cites the cases of *Branzburg* v. *Hayes*, 408 US 655, 33 L Ed 2d 626, 92 S Ct 2646 (1972); *State of Vermont* v. *St. Peter et al.*, 315 A.2d 254; *People* v. *Marahan*, 368 N.Y.S. 2d 685.

The Court has studied Mr. Pennington's citations carefully, particularly the case of Branzburg v. Hayes (supra) and the concurring opinion therein of Justice Powell and must differ with counsel for Mr. Pennington as to what the Supreme Court of the United States held therein.

The majority opinion makes it very clear that there is no constitutional privilege on the part of a reporter to refuse to divulge the name of his informant when summoned before a grand jury or in the course of a criminal trial. They also indicate that there is no conditional privilege either.

Further, the Supreme Court reasoned in their opinion, written by Justice White, that they were being asked to create only a conditional privilege but that to solve the problem before them only an absolute privilege would suffice and in this regard they stated as follows:

> "We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order."

The majority seemed unwilling to engage in the balancing between the freedom of press and the obligation of all citizens to give relevant testimony with respect to criminal conduct indicating, and I quote:

> "In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance: Is there probable cause to believe a crime has been committed? Is it unlikely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?
>
> Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch is not to make the law but to uphold it in accordance with their oaths."

The Court then goes on to say:

> "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with

> respect to the relations between law enforcement officials and press in their own areas."

It is the opinion of this Court that the Supreme Court of the United States was saying in Branzburg v. Hayes (supra) that in the absence of statute there is no constitutionally protected reporter privilege either absolute or conditional, which permits his refusal to divulge the name of his informant when properly subpoenaed before a judge in a criminal trial and directed to give such information.

However, if the Court were to do the balancing as suggested by Justice Powell between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct, suffice is to say that under the factual situation in this case we have a defendant on trial for the most serious of offenses and that the information herein sought using the balance of interests as suggested by Mr. Pennington would still require his disclosure of the source of his information.

Therefore, the Court is overruling the motion to quash the subpoena and is directing Mr. Pennington to appear before this Court at 1:00 o'clock p.m. on Tuesday, November 22, 1977, for further proceedings with relation to this matter.

Very truly yours,

/s/ E. Newton Vickers
E. Newton Vickers
District Judge

Env: aj

APPENDIX "D"

(T-11) * * * and ask counsel to make it again. I'll permit Mr. Hecht to ask the question, and he can exercise his right. Then, I'll have the whole thing in the nutshell. Go ahead, Mr. Hecht.

Q. (By Mr. Hecht) My last question, Mr. Pennington, was: How long have you been employed by KAKE television station in the role of reporter, or journalist?

A. About a year and three months.

Q. Sometime during the summer of 1977, and the fall of 1977, did you have one or more telephonic communications with me?

A. Yes.

Q. And sometime during the fall of 1977, did you have a conversation with one Ernest Feeler?

A. Yes.

Q. During the course of those conversations with either myself or Mr. Feeler, did you disclose to either or both of us that you had an informant who advised you that he had been present at a social gathering in Topeka, Kansas, at a time in which the deceased in this case, Thad Sandstrom's life, had been threatened because of a certain alleged relationship which the deceased was engaged in?

A. (Pause) Yes.

Q. Will you tell me, sir, please the name of that person or informant?

A. With all due respect to the Court and to you, Mr. Hecht, it (T-12) is my feeling that the nature of that conversation, as well as the informant's name, is privileged under the First Amendment of the Constitution of the United States, and I must decline to respond to that question.

Q. All right, would you tell me please, whether or not the contents of that conversation was ever broadcast by you—excuse me, it is correct, is it not, that you are a broadcast journalist?

A. Yes.

Q. Would you tell me please whether or not the ontents or subject matter of the conversation which you had with that informant was ever broadcast?

A. It was not.

MR. HECHT: If the Court please, we would ask the Court for an Order to compel the witness to answer the question identifying the informant.

THE COURT: All right, Mr. Hall.

MR. HALL: I would respond to that request, Your Honor, by first stating that the entire subject matter that came within the knowledge of Mr. Pennington was revealed to Mr. Hecht and has also been revealed to Mr. Bennett and Mr. Olander. The only thing that has not been revealed to counsel in this case is the name of the informant.

My client has, of course, asserted his privilege (T-13) as a newsman to withhold the identity of the informer and alleges that his right and privilege is paramount to any other consideration, and would, in fact, feel, if he's required to answer this question, would be a prohibition and prior restraint of freedom of speech guaranteed by the First Amendment.

I say to Your Honor that the principles set out with respect to newsmen is privileged, and were first set out in Branzburg versus Hayes, 408 U.S. 665, 92 Supreme Court 2646, and it's also cited in 33 Law Ed. 626.

The Branzburg case involved a trilogy of cases, three which were taken up to the Supreme Court together; and in all of those cases, the newsman involved was claiming the privilege with respect to matters which had been ob-

served by the newsman, which were constituted to be criminal offenses, or eyewitness accounts, if you will; and in arriving at their decision, the Court held that without some protection for seeking out the news, and this protection being afforded and extended to newsmen, that freedom of the press would be eviscerated, according to Judge White. In that same case, Judge White, while stating that the Court was not going to try to attempt to set forth a set of rules for weighing these matters did, however, set forth in (T-14) the opinion the test that had been set forth by the Attorney General's Office to govern the issuance of subpoenas to newsmen who were subpoenaed to appear before Grand Juries, and in criminal trials, and Justice White in his—

THE COURT: (Interrupting) Pardon me, here's a note for you, Mr. Hall.

MR. HALL: Excuse me, sir. (Pause) All right, if I may, Your Honor, may I step out for a moment? The men outside are the President of KAKE TV, who will not, I'm sure, be permitted to come in Chambers, and also present is Mr. Ron Loewen, who is an attorney, and who is house counsel for the station, and would the Court permit his presence here just to observe? I don't think he's going to participate in any argument.

THE COURT: Well, you know, I think as our local people are interested, at this point, we probably ought to go into the Courtroom and have our arguments in there.

MR. HECHT: I don't have any objection to going to the Courtroom and conducting the legal arguments in there. I would suggest that it would be unfair to Mr. Pennington and to a number of other persons, for there to be additional disclosure as to what the information is that we are seeking.

MR. HALL: I would tend to concur with that.

(T-15) MR. BENNETT: The State does, too. I don't think we have any objection to the legal arguments being made; but any reference to what is being sought in the way of—

MR. HALL: (Interrupting) I am going to get to in my argument to the Court in a moment, I will be getting into some things directly involving homosexuality and the statements that were made and alluded to. This, I think, is something that at this time should be kept in camera.

THE COURT: Well, I don't think I ought to, you know, let all your people in and keep out all of the local press.

MR. HALL: This man that would be appearing would just be as general counsel for his employer. If the Court would prefer that he not be here, I'll just tell them that.

THE COURT: I think everybody is entitled to hear it at this point; so I think we will go out into the Courtroom and that way nobody can say we're doing things behind the scene, and let's don't allude to that material.

MR. HALL: All right.

(Thereupon, the in Chambers hearing was concluded at 1:45 p.m., this date; and at 1:50 p.m., this date, in the open (T-16) Courtroom, with all parties being present, the following proceedings were had; to-wit:)

THE COURT: All right, we will proceed with the arguments in the Motion before the Court.

MR. BENNETT: Might we approach the Bench just a moment, Your Honor?

(Thereupon, an on-the-record discussion was had at the Bench between Court and counsel, and outside the hearing of the open Courtroom, the following proceedings were had; to-wit:)

MR. BENNETT: In regard to Mr. Hall's last statement just before we left the Court's Chambers that he

was intending to get into some of the aspects of the allegations or of the information that has supposedly been conveyed, and as I understood the Court, you are not going to permit that?

THE COURT: That's right. You're not going to get into that in your argument.

MR. HALL: I think, if I'm going to explain to the Court, and to some extent what is involved, I certainly do think it is important, factually, here that we relate directly to the questions of law that are involved in the case, and I think without the inclusion of those particular facts—

THE COURT: (Interrupting) Are they facts that have to do with other cases?

(T-17) MR. HALL: These are facts that have to do with this case, Your Honor, and I don't think in order to present my arguments in this case, I think I'm going to have to align the facts in this case with facts in other cases.

MR. HECHT: The only facts that are material, Your Honor, is whether or not there was a conversation, whether or not it was in the role of a journalist, whether or not the contents of it and the source of it will be identified. The contents have absolutely nothing to do with whether there is or is not a right to or a privilege not to disclose.

MR. HALL: The cases that I have read, Your Honor, have a great deal to do with relevancy, the bearing on the guilt and innocence of the defendant, and maybe Mr. Hecht has read a different series of cases than I have read.

THE COURT: Just a second. It seems like, if what I understand from what I know of this, that the Court has to do a balancing process between the defendant's rights and your client's First Amendment rights, is that not correct?

MR. HALL: Yes, Your Honor, but including—

THE COURT: (Interrupting) Yours is not an absolute right under the First—

(T-18) MR. HALL: (Interrupting) I think under the facts in this case and the cases that I will cite to you, it is almost absolute, yes, Your Honor.

MR. OLANDER: Can we submit those cases that allude to those specific facts, can those be submitted to the Court rather than arguing to the Court in open?

MR. HALL: I'm entitled to make legal arguments—

THE COURT: (Interrupting) But not to prejudice the State's case or the defendant's.

MR. OLANDER: If we start getting into matters that may or may not be in the case, it will just sensationalize this trial. If we're going to argue, it ought to be in camera.

MR. HECHT: I would agree.

MR. HALL: I would agree. I would agree to an in camera argument. It's going to be tying my hands behind my back if I'm not permitted—

THE COURT: (Interrupting) All right.

(Thereupon, the on-the-record discussion had at the Bench between Court and counsel, and outside the hearing of the open Courtroom, was concluded; after which time, the following proceedings were had; to-wit:)

THE COURT: The Court will find that the matters involved in the arguments are such that they should be heard by the Court in camera, in Chambers, out of the (T-19) presence of the public generally; so we will be in recess at this time.

(Thereupon, at 1:55 p.m., this date, a further in Chambers hearing was had with all parties appearing as before, the following proceedings were had, to-wit:)

THE COURT: All right, proceed on.

MR. HALL: I was speaking about Justice White's discussion in the Branzburg case with respect to certain tests laid down by the Attorney General which covered the issuance of subpoenas to newsmen who are requested to appear before Grand Juries and who are requested to appear and testify in criminal trials.

These are set out in 28 C.F.R. 50-10; and basically, these rules laid down by the Attorney General are as follows: Number one, is there sufficient reason to believe that the information sought is essential to successful investigation, and number two, whether the government has unsuccessfully attempted to obtain the information from an alternative non-press source. These rules have directly, and indirectly, later been adopted by other Courts.

Justice Powell, in his concurring opinion in Branzburg stated: "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the (T-20) obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional ways of adjudicating such questions." Now, you'll notice in that statement Justice Powell talked about striking a proper balance between freedom of the press and the obligation with respect to criminal conduct that citizens have to give relevant testimony, and we think that the relevant testimony means relevant to the guilt or innocence of the defendant in the case.

Now, that argument was somewhat attacked in Saxbe versus Washington Post, which is 417 U.S. 843, 41 Law Ed. Second 514, 94 Supreme Court 2811. In that case, the argument was made that Branzburg specifically and clearly denies any First Amendment rights to the press; and in response to that argument in Saxbe, Justice Powell stated, and I quote from the case: "To the contrary, we recog-

nized explicitly that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful." Justice Powell went ahead then and quoted again from Justice White in Branzburg stating: "Nor is it suggested that news gathering does not qualify for First Amendment protection; (T-21) without some protection for seeking out the news, freedom of the press could be eviscerated."

Now, here, Mr. Pennington is not an eyewitness or an observer of the facts as was present in Branzburg. In this case, Your Honor, Mr. Pennington was told by an individual who appeared at a party where allegedly the deceased in this case, the victim in this case, and a Mr. Winders were present.

Mr. Pennington was told by this person that during the party a loud argument arose between the victim in this case and Mr. Winders. Mr. Pennington was told by the informant that he did not hear a threat made; but after the party, or later on, he inquired of one of his friends who was also at the party what the argument was about, and the informant was told that Mr. Winders—

MR. HECHT: (Interrupting) Well, now, if the Court please, I would object to counsel stating what Mr. Pennington says or what Mr. Pennington was told by somebody else. There isn't any evidence of that; and if Mr. Pennington doesn't choose to testify as to what the facts are, counsel can't insert into the record what he understands the facts to be.

MR. HALL: Well, now, you had the right to ask Mr. Pennington what those facts were. They have been fully related to you, Mr. Hecht. I'm sure this comes (T-22) as no surprise to you, and I will ask Mr. Pennington at this point if what I just related to the Court is, in fact, true.

MR. HECHT: I object to the procedure. Either he testifies or he doesn't testify. Counsel can't make a state-

ment and then turn to his client and say, "Is that true?" He has a privilege, or he doesn't have a privilege. He doesn't have a privilege to answer some things and not answer other things.

MR. HALL: Yes, we do. We are not claiming a privilege here as to content or information which Mr. Pennington received from the informant. The only privilege here being claimed is Mr. Pennington's right to conceal the identity of his informant; and I'll be happy to at the conclusion of my argument to ask Mr. Pennington to reiterate exactly what was said to him under oath. He is under oath—

THE COURT: (Interrupting) What's the point, Bob, in limiting this? I would think you would want to know what this was.

MR. HECHT: I know what he told me, and you have testimony in front of you from another witness as to what he told that other witness. What I don't want is there to be indirectly, or done indirectly the insertion into the record of evidence which is not the (T-23) subject of testimony and—

MR. HALL: (Interrupting) Let's just consider this in the nature of a proffer then, Your Honor, at this point in time.

MR. HECHT: Well, a proffer is only appropriate when a witness has attempted to testify and the questions and answers have been refused by the Court.

MR. HALL: He was your witness, Mr. Hecht. You could have asked him those questions, if you were interested. I presumed that him having previously told you what the subject matter was that you didn't go into it for that purpose.

MR. HECHT: Counsel, I asked him the questions that I wanted to ask him. Now, if you want to ask him questions, I don't have any objections to that. I do object

to you making a speech and then turning around and asking your client—

THE COURT: (Interrupting) Why don't I permit you to ask him the questions?

MR. HALL: All right.

QUESTIONS BY MR. HALL:

Q. Mr. Pennington, at the time you talked to the individual, did you have reason to talk to an individual who attended a party where Mr. Sandstrom and Mr. Winders were present?

A. I can't say that the party with whom I spoke actually (T-24) attended a party. He did indicate to me that he had attended a party where Mr. Winders and Mr. Sandstrom were present.

Q. All right, and did he notice anything unusual at that time while the party was in progress?

A. My informant told me that there was a loud argument between Mr. Sandstrom and Mr. Winders.

Q. Did your informant tell you what the argument was about?

A. My informant told me that he had been drinking quite a bit on this occasion. He was a reasonable distance —he didn't put a figure on it—from the conversation, from the argument, and that he did not hear anything more than a few words here and there.

He did tell me that he did ask a friend or friends of his who were also present at the party, later in the evening what the argument was about, and that his friend or friends responded that Mr. Winders had threatened Mr. Sandstrom's life over a matter of sexual conduct between Mr. Sandstrom and a gentleman in Kansas City, Missouri, not naming that individual.

Q. Did you have an understanding of what he was trying to tell you? Were there any inferences of a homosexual relationship?

A. Yes, there were. He was very clear about that.

Q. And would you expand on that for the Court, please?

A. My informant told me that to his knowledge Mr. Sandstrom had been involved in homosexual activities on previous (T-25) occasions; that his friend or friends indicated to him when he inquired about the nature of the argument which occurred at the party that he was told that the argument was over an affair—using his word—between Mr. Sandstrom's sexual affair between Mr. Sandstrom and an unnamed gentleman in Kansas City.

Q. It's your understanding that Mr. Winders also was having a relationship with this man in Kansas City?

A. No, quite the opposite. My informant tells me that that is why he was told Mr. Winders was upset. Apparently, he had just learned of the relationship, or something of that nature.

MR. HALL: I have no further questions.

QUESTIONS BY MR. HECHT:

Q. Mr. Pennington, did you advise both me and/or Mr. Feeler that you considered your informant to be a reliable person who was a former businessman in the Topeka, Kansas area?

A. I did inform you that he was, in my opinion, a reliable character. I don't recall making any reference to the gentleman's position.

MR. HECHT: I have no further questions.

THE COURT: All right.

MR. HALL: Well, based on that, Your Honor, saying again that here Mr. Pennington was not an eyewitness or observer of any facts connected with the subject matter of this trial, and that the defense counsel knows (T-26) the name of the witness who allegedly made the threats, and the State—include them in this argument—both know

that the purported threats were made at a party attended by some numerous people, particularly attended by Mr. Winders, who I understand is to be one of the State's witnesses, and these are people other than the informant, himself.

Counsel in this case knows that there are other available sources, knows that the threats were not made to or by the informant. They both know that any such statements that may have been made will be irrelevant and immaterial to the issue of guilt or innocence of Mrs. Sandstrom, the person on trial in this case, and would otherwise be completely collateral.

Now, the Supreme Court in Vermont had this very question before it. A newsman refused to testify as to a source of information he had received in advance from a tipster of a drug raid, and the sole purpose of this was to attempt to impeach or collaterally attack testimony of other witnesses in the case, and the Court fully discussed Branzburg in State versus St. Peter, which is 315 Atlantic 2nd 254. I do not have the Vermont citation on that case, and the Court discussed Branzburg and the balancing required to be given by the Court between freedom of the press and the * * *.

* * *

(T-43) person present at that party, which other person is a witness for the State in this case, and that that threat centered around an alleged relationship which the deceased, Mr. Sandstrom, was having with another male person?

A. The statement is correct insofar as we understand that is what my informant told me.

Q. Yes. Will you tell me, please, sir, the name of that informant?

A. Mr. Hecht, as I stated at the last hearing in the Judge's Chambers, I do consider that informant to be privileged by the First Amendment to the United States Constitution. With due respect, I still decline to answer the question.

Q. And Mr. Pennington, if I would ask you a series of questions calculated for the purpose of causing you to reveal the identity and whereabouts of that person, would your answers to these questions be the same as your last answer?

A. Yes, it would.

MR. HECHT: If the Court please, we would respectfully request that the Court order the witness to answer the questions.

MR. BENNETT: Before you do that, I would like to ask Mr. Pennington some questions.

THE COURT: All right, go ahead.

QUESTIONS BY MR. BENNETT:

Q. Mr. Pennington, you have refused to reveal the name of the * * *.

APPENDIX "E"

(T-25) * * * occasions; that his friend or friends indicated to him when he inquired about the nature of the argument which occurred at the party that he was told that the argument was over an affair—using his word—between Mr. Sandstrom's sexual affair between Mr. Sandstrom and an unnamed gentleman in Kansas City.

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nesses, and these are people other than the informant, himself.

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A similar question was raised in Brown versus Commonwealth, which is reported in 204 S.E. Second 429, and in that case, in which they cite Branzburg and also cite

the Peter case, the Court held: "The general rule is that a defendant has the right to impeach the credibility of a prosecution witness by proving prior inconsistent statements which call into question the truth of his testimony" —that is the general rule—"but under the rule we adopt" —laid down in State versus Peter—"when such a right collides with the newsman's privilege of confidentiality, the privilege prevails."

In Morgan versus State of Florida, which is 337 (T-28) Southern 951, in that instance, a newspaper reporter published a synopsis of a Grand Jury sealed presentment. He refused to identify the informer who gave him this information, and the Court said then in that case that because there was no eyewitness involvement, as was present in Branzburg, they recognized the reporter's First Amendment rights, and they refused to have him identify his informer, or the person who furnished him with the Grand Jury presentment.

The latest case, Your Honor, is a 1976 case, which is People versus Marahan, which is 368 New York Second 685. This case, Your Honor, is a very scholarly work. It goes back to Andrew Hamilton's defense in the John Peter Zenger case, and it traces the complete history of the First Amendment rights, including Branzburg, Saxbe, Peters, Brown versus Commonwealth, all of the cases I have just given you.

In that case, a newspaper reporter had published in the newspaper something to the effect that the cops said, as the result of an anonymous phone tip, the cops placed a house under surveillance prior to a raid. Well, two police officers had testified in this case, and the defendant thought that one of the two police officers who had testified had testified that they had given no prior notice and sought to impeach their (T-29) testimony, and the defendant sought to have the reporter reveal the name of the infor-

mant, the policeman who gave him the tip, or the person who gave him the tip; and in that case, they cited Justice Stewart out of Branzburg. They cited Justice Powell out of Branzburg, and they held that, as all the other Courts have, including Saxbe, that the Branzburg case was limited only to the situation where news sources themselves are implicated in a crime or possess information relevant to the Grand Jury's task; and if they don't have that information, they need not be concerned about subpoenas; that the attempt to use a reporter's testimony for impeachment purposes on collateral issues will entitle the reporter to the First Amendment privilege.

The Court went on to cite, for instance, Bernstein and Woodward, the two reporters of the Washington Post, if they had been required to reveal their source of information, and specifically named the Deep Throat source back there, if they had been required in the course of those judicial proceedings in Washington D.C. to reveal the name of their informant, it would have destroyed the Watergate investigation, and the Court recognized the integrity and privilege that the newsmen have to protect his informant, and there is a (T-30) great distinction laid down in all of these cases between information that comes into the hands of the newsman as an eyewitness or as a particular incident then occurs when they are receiving information from an informer; and in each case that I cited to you here, Your Honor, there are no cases to the contrary that I've found since Branzburg when a reporter has information that he's received from an informer that does not directly affect the guilt or innocence of the person on trial.

The Courts have always granted the reporter his First Amendment privilege and have failed to compel him to answer such questions, and I have, Your Honor, because in the Marahan case, it quotes extensively out of Branzburg, out of St. Peter, out of Brown, out of Saxbe, I did xerox that particular case, and I have it here.

THE COURT: I appreciate that.

MR. HALL: That is the latest case in the area that I could find; so therefore, Your Honor, I would say that this argument that purportedly occurred between Mr. Winders and Mr. Sandstrom would be collateral and would not directly affect the guilt or innocence of Mrs. Sandstrom, who is on trial in this case.

I would submit further, Your Honor, that Mr. Winders (T-31) is present here in Court. He will be present in Court. He can be asked these questions, and the only purpose this could serve would be to impeach, and the Courts have clearly held that's a collateral matter and is not subject to being discovered.

THE COURT: Thank you. Mr. Hecht?

MR. HECHT: If the Court please, the matter is not collateral. The matter has to do with a threat to the life of the deceased. It also has to do with the unusual relationship the deceased is accused to have been engaged in.

It shouldn't pass the Court's notice that the person who is alleged to have made the threat is the principal witness of the State. It is the person who was first on the scene. It is the person who claims certain communications were made by the defendant. It is the person who claims certain admissions were made by the defendant, in the absence of anybody else being present, and it is the person who claims to have discovered or obtained an incriminatory note. It is also the person who was claimed to be the intermediary between the defendant and the deceased.

It also involves a subject which is necessarily of great importance on the question of mental capacity of the defendant, as I'm sure Your Honor can appreciate; (T-32) and if the existence of such a relationship, in fact, occurred and was an on-going relationship between the deceased and other persons, that such a fact would be of substantial

importance to a psychiatrist in determining the mental stability of the defendant; and as of course, Your Honor has heard on many occasions that it's bad enough for a woman to lose her husband to another woman, but it's somewhat different to lose her husband to another man.

Counsel stated in open Court that he thought maybe I read different cases then he did, and I don't think that's true, but I think maybe he and I read the same cases differently; inasmuch as in the Branzburg case Justice White stated as follows: "Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do."

Justice Stewart in that same case said:

"Freedom of the press, hard won over the centuries by men of courage, is basic to a free society. But basic to our Courts of justice, armed with the (T-33) power to discover truth. The concept that it is the duty of a witness to testify in a Court of law has roots fully as deep in our history as does the guarantee of a free press.

"It would be a needless exercise in pedantry to review here the historic development of that duty. Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of judicial power of the United States. Whether or not the power to invoke this judicial power be considered an element of Fifth Amendment due process, its essentiality to the fabric of our society is beyond controversy. As Chief Justice Hughes put it: 'One of the

duties which the citizen owes to his government is to support the administration of justice by attending its Courts and giving his testimony whenever he is properly summoned.'

"If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. (T-34) 'The right to sue and defend in the Courts is the alternative of force. In an organized society, it is the right conservative of all others, and lies at the foundation of orderly government.'"

There is a later case than what counsel refers to that the United States Supreme Court declined a certiorari of the opinion of the Supreme Court of the State of Idaho, if Your Honor please, in October of 1977, in the case of the Tribune Publishing Company versus Caldero, 76-1848.

The facts of the denial of certiorari is reported in The Criminal Law Reporter, November ?, 1977, 22 Crl 4053.

The Idaho decision, if Your Honor please, is Michael A. Caldero versus Tribune Publishing Company was decided by the Supreme Court of Idaho on March 4, 1977, and is reported at 98 Idaho 288; 562 Pacific 2nd 791. That case goes through the Branzburg case, Your Honor, and a number of other cases, and it talks of Judge White and Judge Stewart and Judge Potter and their language in the Branzburg case, and it cites the Garland versus Torre case, and a number of other cases; and it just boils down very simply that where you have a conflict between the right of free press, insofar as that right—if there is one —centers around (T-35) a refusal to disclose an informant, vis-a-vis the right of an accused person, for the compulsory Order of the Court for attendance of witnesses and dis-

closure of information, the right of due process and fair trial supersedes.

There can't be any question under the facts in this case, as Your Honor knows them to be, that that information is of substantial importance to the defense, and that the defendant's right of fair trial, compulsory assistance from the Court for attendance of witnesses and disclosure of testimony and due process supersedes any right which a newsman has—if any they have—to disclose the identity of an informant.

Many of the cases which are cited also involve statutory privileges, and Kansas has refused to adopt a statutory privilege of a newsman to refuse to testify in Court, and we submit, Your Honor, that this Court has no alternative but to issue the Order which we seek.

There are no other remedies available to this defendant, and we remind the Court that we sought this relief prior to commencement of this trial, ex parte, and proposed that we would submit to Your Honor a suggested Order, which Your Honor could consider in determining whether or not our request was appropriate, (T-36) and the Court gave some consideration to our request and advised us by letter—a copy of which I'm sure is in the file—without stating the reasons or what the request engaged in—that it did not feel that there was a procedure available at that time prior to the commencement of the proceedings for issuance of such an Order, or for such a hearing, which left us with the alternative of seeking the Order by issuing a subpoena once these proceedings commenced. That's what we have done, and that's what remedy we ask for.

THE COURT: What evidence can you present that you have done one thing, other than just this man? Obviously, you all could find out what party we're talking about. If you knew there was a party, you've got Winders

out there. You people ought to be able to find out who was at that party and where it took place.

MR. OLANDER: We have no information other than what's been said here, Your Honor.

THE COURT: Have you asked Winders?

MR. OLANDER: We have asked Winders in regard to any relationship.

THE COURT: Do you take issue, Mr. Hecht, with this man's statement? It would seem to me that you would have to exercise in every way before we started forcing freedom of the press down the drain. What have you done, * * *.

APPENDIX "F"

(T-47) * * * precedent for granting your privilege, conditional privilege, in connection with a situation of this type. I, likewise, respectfully am ordering you to divulge at this time the name of your informant.

MR. PENNINGTON: Yes, sir, Your Honor, and again, with due respect, I, myself, decline.

THE COURT: All right, Mr. Pennington, do you realize that this would result in my finding you probably in criminal contempt of this Court?

MR. PENNINGTON: I understand that that is a possibility.

THE COURT: All right, Mr. Pennington, having declined, is there any reason why I shouldn't proceed in connection with this, Mr. Hall?

MR. HALL: Well, Your Honor, I would suggest to the Court that under In re Farris, which, I believe is 215 Kan. 704, if my cite is right—excuse me, 175 Kan. 704, in which the facts in that case involved witnesses who were subpoenaed to testify at an inquisition in Wichita, Kansas. The Court found them in direct contempt of Court and sentenced them and remanded them into the custody of the Sheriff, and an appeal and an application for Writ of Habeas Corpus was filed with the State Supreme Court, and the State Supreme Court refused to grant the Writ. The case was then appealed to the United States Supreme Court. If the Court will (T-48) give me a moment, I can give you the citations on that. (Pause) 348 U.S. 933; 99 Law Ed. 732; 75 Supreme Court 355.

The Court received the Writ of Certiorari, and in its opinion summarily reversed the Supreme Court of the State of Kansas, citing therein In re Oliver, which is 92 Law Ed. 682, 333 U.S. 257, and the Supreme Court of the

United States held that refusal to grant a witness claiming privilege from a hearing was entitled to a hearing, and entitled to be represented by counsel, and entitled to prepare his defense to the charge of contempt, and that the Court very fairly defined those situations in which the Court could find direct or criminal contempt, in such situations that were disrespectful, disruptive, or demoralizing to the Court, and this situation was not one of those; and in line with the In re Farris decision as reversed by the United States Supreme Court, I do not believe that the Court should find Mr. Pennington in direct or criminal contempt of this Court.

I believe Mr. Pennington honestly believes that he has this constitutional right. I think it's being exerted by him in good faith, and I think if the Court wishes to cite Mr. Pennington for contempt, the Court should issue perhaps a Show Cause Order to Mr. Pennington (T-49) to order him to appear before this Court at sometime in the future and give him adequate time to prepare his defense and allow him to appear then for a full hearing; and this, of course, would entitle Mr. Pennington also to take an appeal from any finding that the Court might enter at that time and present his question to a higher appellate court. That's all I have to say, Your Honor.

THE COURT: Well, it's my judgment, in connection with In re Oliver, that was a 1948 decision, the Supreme Court held: ". . . that in the case of indirect contempt, no order of confinement may be made without the observance of all the Sixth Amendment requirements. With respect to direct contempt, the Court carefully delineated an area in which imprisonment may be imposed without a separate trial which grants all the due process rights of an accused. It defined the area as follows:

'The narrow exception to these due process requirements includes only charges of misconduct, in open Court, in the presence of the Judge, which disturbs the Court's business, where all of the essential elements of the misconduct are under the eye of the Court, are actually observed by the Court, and where immediate punishment is (T-50) essential to prevent demoralization of the Court's authority' . . ."

In this instance we have before us here, and certainly Mr. Pennington believes in that position which he has taken here, but we also have a woman charged with Murder in the First Degree, and I have had to balance, and have in my mind, and this trial is in process and we'll probably start with the evidence next Monday or Tuesday of next week, and it will take another two weeks in time, and it would go to the heart of the process of the Court and be demoralizing to this Court if I should have a trial with any information that could possibly be determined that it might tend to establish her innocence to the charge which she stands faced with here; and therefore, I must find that there is direct criminal contempt, and I will inform the defendant that I am not going to impose a sentence on him in excess of six months, which, I feel, if that's the case, he would certainly have to have a separate trial in connection with the present facts as we have before us.

So at this time, is there any reason what I shouldn't proceed, counsel, other than which you have already stated?

MR. HALL: No, Your Honor.

APPENDIX "G"

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

CASE NO. 49,660

IN THE MATTER OF THE APPLICATION OF JOE PENNINGTON FOR A WRIT OF HABEAS CORPUS,

Petitioner,

vs.

F. T. JIM CHAFFEE, Sheriff of Shawnee County, Kansas,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Comes now Petitioner, and for his Petition to this Court for a Writ of Habeas Corpus, states and alleges as follows:

1. That Petitioner is a resident of Wichita, Sedgwick County, Kansas, and is presently confined and being restrained in the Shawnee County jail by Respondent, pursuant to an Order issued by the Honorable E. Newton Vickers, Judge of the District Court of Kansas, Third Judicial District.

2. That Petitioner is a news reporter employed by KAKE-TV, Wichita, Kansas. That on the 14th day of November, 1977, Petitioner was served in Wichita, Kansas, with a Subpoena requiring him to appear and testify on November 14, 1977, in the case of State of Kansas vs. Milda R. Sandstrom, Case No. 77CR546, then pending in Division No. 3 of the District Court of Kansas, Third

Judicial District. Pursuant to conference and agreement, Petitioner's appearance was continued to 1:30 p.m., November 16, 1977. Prior thereto, counsel for Defendant Sandstrom had filed a Motion in said case requesting an Order from said Court to compel Petitioner to reveal the name of the informant who was the source of a rumor concerning an alleged threat against the life of Defendant Sandstrom's husband, Thad Sandstrom. Proceedings commenced in chambers by agreement and counsel for Petitioner moved the Court for an Order to Quash the Subpoena on the grounds that such information was privileged under the First Amendment to the Constitution of the United States of America. Said Motion to Quash was overruled, Petitioner granted the right to reassert the Motion, and Petitioner was sworn and examined.

3. Petitioner testified under oath that during May, 1977, he was employed by KAKE-TV as an investigative reporter and in the course of his employment was investigating facts surrounding the murder of Thad Sandstrom. Petitioner further testified that a confidential source gave him the name of a person who had some information about the murder. Petitioner contacted said informant, who, in confidence, stated that some three or four weeks prior to the murder he was present at a party attended by 10 to 20 men, including Thad Sandstrom and a principal witness for the prosecution in the pending criminal case above referred to. During the course of the party, Petitioner's informant allegedly heard and observed an argument between Thad Sandstrom and the said witness for the prosecution, but was unable to hear or otherwise ascertain the subject matter of said argument. Petitioner's informant advised that later in the evening he asked another person who was attending said party about the subject matter of the argument. Petitioner's informant was advised that

Thad Sandstrom had been accused by the prosecution witness of maintaining a relationship with a young man in Kansas City; and was admonished that if said relationship was not immediately terminated, the prosecution witness would kill him. Your Petitioner, for various reasons, including the hearsay nature of the information, did not publish any of said information over KAKE-TV, but did privately reveal the substance thereof to counsel for Milda R. Sandstrom and the County Attorney for Shawnee County, Kansas.

4. Petitioner, upon further examination, was asked to name the person who provided the above information. Petitioner declined to answer on the grounds that such information was privileged to him as a newsman under and pursuant to the First Amendment to the Constitution of the United States. A Motion was then made to the Court by Defendant's attorney for an Order to compel Petitioner to identify his informant. Petitioner's counsel responded to said Motion and the Court, after listening to statements of the witness and arguments of counsel, took the matter under advisement. On November 17, 1977, said Court issued an Order again overruling Petitioner's Motion to Quash and directing him to appear before the Court on Tuesday, November 22, 1977, for further proceedings.

5. On November 22, 1977, Petitioner appeared before the Court, further proceedings were had and Petitioner, again asserting his First Amendment rights, refused to identify his informant.

6. The Court thereupon summarily convicted Petitioner of contempt of said Court without trial and ordered him directly into the custody of the Sheriff of Shawnee County, Kansas, thereby restraining your Petitioner of his liberty in violation of his constitutional rights.

7. Your Petitioner complains that said restraint is wrongful in that his right as a newsman to withhold the identity of his informant is a privilege guaranteed to him under the First Amendment to the Constitution of the United States. Your Petitioner further complains that said restraint is wrongful in that he has been deprived of his liberty without due process of law and has been sentenced to confinement without being given a reasonable opportunity to be heard, a right guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, your Petitioner respectfully requests the Court grant him the following relief:

(A) to issue a Writ of Habeas Corpus to the Sheriff of Shawnee County, Kansas, for Petitioner;

(B) to issue a Temporary Order forthwith releasing Petitioner upon his own recognizance or upon bond until further Order of this Court;

(C) to grant Petitioner an immediate hearing;

(D) to grant Petitioner oral argument.

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1500 North West Street
Wichita, Kansas 67201
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Adams, Jones, Robinson and Malone, Chartered
By /s/ Robert Hall
Robert Hall
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned, one of the Attorneys for Petitioner, does hereby certify that a true and correct copy of the above and foregoing Petition for Writ of Habeas Corpus and Memorandum in Support of Petition for Habeas Corpus was served upon the Respondent, F. T. Jim Chaffee, Sheriff of Shawnee County, Kansas, by serving Deputy HLADKY, on this 22nd day of November, 1977.

/s/ Robert Hall
Robert Hall

Memorandum of Law

I

CLAIM OF PETITIONER

Petitioner's Petition is based on a denial of a privilege arising under the right of free press guaranteed by the First Amendment to the Constitution of the United States and the Bill of Rights of the Constitution of the State of Kansas, and confinement without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

II

SUMMARY OF PETITIONER'S ARGUMENT

In holding the Petitioner did not have such a First Amendment privilege, the Trial Court relied upon *Branzburg* v. *Hayes* (408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972)). A copy of the Opinion by Judge Vickers is attached hereto. In page 3 of that Opinion, Judge Vickers states:

> "It is the opinion of this court that the Supreme Court of the United States was saying in *Branzburg* v. *Hayes* (*supra*) that in the absence of the statute, there is no constitutionally protected reporter privilege either absolute or conditional, which permits his refusal to divulge the name of his informant when properly subpoenaed before a judge in a criminal trial and directed to give such information."

The Court failed to properly consider other cases cited by counsel which have limited and construed *Branzburg* (*supra*).

III

DISCUSSION OF LAW

Branzburg was a trilogy of cases. All involved reporters who were eyewitnesses to the crimes in question and who refused to disclose what they observed. The Court found the First Amendment gave newsmen no absolute right against appearing before a grand jury to disclose the information obtained within the scope of their employment. Nonetheless, Justice White stated that "without some protection for seeking out the news, freedom of the press could be eviscerated." (Id., at 681, 33 L. Ed. 2d 626).

The Trial Court's Opinion ignores *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 859, 416 L. Ed. 2d 514, 94 S. Ct. 2811 (1974). *Saxbe* extended and clarified *Branzburg* by finding a reporter does have a First Amendment right to refuse to disclose news sources.

> "It is true, of course, that the *Branzburg* decision rejected an argument grounded in the assertion of a First Amendment right to gather news and that the opinion contains language *which, when read in isolation*, may be read to support the majority's view. . . .

> Taken in its entirety, however, *Branzburg* does not endorse so sweeping a rejection of First Amendment challenges to restraints on access to news. The court did *not* hold that the government is wholly free to restrict press acts as to newsworthy information." (At 417 U.S. 859) (emphasis supplied).

The Trial Court's interpretation of *Branzburg* is in contradiction to the rule laid down in *Saxbe, supra.* In *Saxbe, supra,* Justice Powell said in response to the argument that there exists no First Amendment privilege:

> "To the contrary, we recognize explicitly that the constitutional guarantee of freedom of the press *does extend* to some of the *antecedent activities* that make the right to publish meaningful: 'Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.'" (Id.) (emphasis supplied).

Obviously, such right does not extend to eyewitness observations as were present in *Branzburg, supra.* If it applies to some antecedent activities, then it must apply to non-eyewitness news sources.

The Tenth Circuit has recently recognized this First Amendment privilege in *Silkwood, et al.* v. *Kerr-McGee Corporation, et al.*, No. 77-1287, C.A. 10, reported September 23, 1977. In *Silkwood*, defendant newsman refused to disclose information obtained by him from confidential sources while making an investigation concerning the death of a decedent. The Tenth Circut recognized the reporter's right to refuse to disclose such information, and remanded the case to the District Court to consider the nature of the evidence sought, the efforts to obtain in from other sources, the necessity to have it, and its relevance.

The Circuit Court relied upon *Branzburg* in finding "[t]he use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request . . . . In holding that a reporter must respond to subpoena, the Court is merely saying that he must appear and testify. *He may, however, claim his privilege in relationship to particular questions which probe his sources.*" (emphasis supplied).

No attempt was made here by the Trial Court to reconcile nor apply *Branzburg* or *Silkwood, supra,* to the facts at hand, nor was any attempt made by counsel to show other sources were sought for such information, even though the name of the person who made the alleged threat was known to them. Nor was an attempt made to show the necessity of such information to Defendant Sandstrom or to the prosecution, or its relevance, "all of which are highly important criteria." (*Silkwood*). Without such a showing evidence, the Court would be unable to thereby properly apply *Silkwood, Branzburg* and *Saxbe.*

Several State Courts have also recognized the reporter's right to withhold disclosure of his source. In *State* v. *St. Peter,* 315 A.2d 254, -Vt-, a newsman refused to testify as to his source of information received in advance of a drug raid. Such testimony was solicited to impeach a police officer's testimony. In discussing *Branzburg,* the Court held "when a newsman, legitimately entitled to First Amendment protection objects on grounds of First Amendment privilege, he is entitled to refuse to answer unless the interrogator can demonstrate to the judicial officer that there is no other adequately available source for the information and that it is relevant and

material to the issue of guilt or innocence. If such a showing cannot be made to a measure consistent with the overriding of any First Amendment concern, the witness cannot be properly compelled to answer the question."

A similar question was presented in *Brown* v. *Commonwealth,* 204 S.E.2d 429. The Court held as a general rule, "a defendant has the right to impeach the credibility of a prosecution witness by prior and inconsistent statements which call into question the truth of his testimony—but under the rule laid down in *St. Peter* which we adopt when such a right collides with the news privilege of confidentiality, *the privilege prevails.*" (emphasis supplied).

In *People* v. *Marahan,* 368 N.Y.S. 2d 685, a reporter published an anonymous tip he received from a policeman prior to an eventual raid. At trial, the defendant sought to have the reporter reveal the name of his informant. The New York Court upheld the reporter's right not to disclose the source. "The attempt to use the reporter's testimony for impeachment purposes on a collateral issue will entitle the reporter to a First Amendment protection." (citing *St. Peter*). The Court held that under *Branzburg* "only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenaes." (92 S. Ct. at 2661).

IV

DENIAL OF DUE PROCESS

Petitioner was confined without a hearing in violation of his constitutional rights for contempt of Court. In refusing to answer, Petitioner was respectful, not disruptive, nor did he contribute to any demoralization of the Court's authority. Therefore, Petitioner was entitled to a full

hearing on contempt with the right to counsel and adequate time to prepare his defense. *Re William Oliver*, 333 U.S. 257-286, 92 L. Ed. 682; *Cooke* v. *United States*, 69 L. Ed. 767; *In Re Ferris*, 175 Kan 704, Rev. 348 U.S. 933, 99 L. Ed. 732, 75 S. Ct. 355.

V

CONCLUSION

A review of the cases cited above shows that except for eyewitness observations a reporter must disclose his source only where such disclosure directly tends to prove the guilt or innocence of the defendant. The reporter in *Branzburg* was an eyewitness to the crime. Petitioner was not an eyewitness to the crime, nor was his informant. His informant does not possess any but hearsay evidence. The person who allegedly made the threat is known but unquestioned as to whether or not he made such threat. If such threat was denied by the alleged maker, the testimony of the witness or witnesses sought to be identified could only serve to impeach such denial by the alleged maker. Such impeachment would be collateral and would not prove or disprove the guilt or innocence of the defendant. Therefore, Article 11 of the Bill of Rights of the Constitution of the State of Kansas and the First Amendment privilege and the Fourteenth Amendment rights of Joe Pennington must be recognized and proper relief granted.

APPENDIX "H"

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS

CASE NO. 77 CR 546

STATE OF KANSAS,
Plaintiff,

vs.

MILDA R. SANDSTROM,
Defendant.

IN RE APPLICATION OF
JOE PENNINGTON

Notice is hereby given that Joe Pennington appeals from an Order compelling him to disclose the identity of an informant in contravention of his constitutional rights, and the Order of conviction for contempt entered on the 22nd day of November, 1977, by the Honorable E. Newton Vickers to the Court of Appeals of the State of Kansas.

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Adams, Jones, Robinson and Malone,
Chartered

By /s/ Robert Hall
Robert Hall
Attorneys for Joe Pennington

CERTIFICATE OF MAILING

The undersigned, one of the Attorneys for Joe Pennington, does hereby certify that a true and correct copy of the above and foregoing Notice of Appeal was mailed, postage prepaid, on this 22nd day of November, 1977, to the following:

Mr. Mark L. Bennett, Jr.
Attorney at Law
Room 500
700 Kansas Avenue
Topeka, Kansas 66603

Mr. Gene M. Olander
District Attorney
212 Court House
Topeka, Kansas 66603

Mr. Robert D. Hecht
Attorney at Law
Room 202
3401 Harrison Street
Topeka, Kansas 66611

/s/ Robert Hall
Robert Hall

APPENDIX "I"

BRIEF OF STATE

(-18-) * * * Assuming that it is true that Mr. Winders was not asked by Mr. Hecht for the information sought, it would not be surprising that the type of information sought would not be readily divulged by a person who's character would be called into question by divulging the information. Without the identification of the source of this information, it has the status of being the grossest kind of unverifiable rumor. This would leave the defendant in a somewhat untenable position of seriously discussing the issues raised with a person unreceptive to that type of discussion. In other words, instead of Mr. Hecht being able to say to Mr. Winders "I have information from Mr. X and he said that he overheard you. . .", the situation would be one in which Mr. Hecht would presumably have to say, "Mr. Winders, I have information which a reporter gave me, that somebody had told him that they had heard another person say that they had heard you say. . ." We think this is not consistent with a defendant's right to investigate and present whatever defense there may be to a particular charge.

The second part of the standard urged is that the investigating party demonstrate the information sought is relevant and material to the issue of guilt or innocence. We must frankly say that at least from the state's point of view this would have to be the strongest point in Mr. Pennington's favor. As far as can be told from the information provided by Mr. Pennington, the disclosure of the name of the informant would have no bearing whatever on the guilt or innocence of Mrs. Sandstrom. It can only

be assumed that the information sought (-19-) would have been used to try to impeach the testimony of Mr. Winders who was, as previously stated, a principal witness on behalf of the State. From the information provided, it would appear that little more could have been achieved than to call Mr. Winders' character into question but hardly his truthfulness or veracity as far as his testimony concerning matters related to the guilt or innocence of Mrs. Sandstrom.

Nonetheless, it was the finding of Judge Vickers that the defendant was entitled to this information, and that even if there were applied a balancing test, that the gravity of the crime charged against Mrs. Sandstrom and her resulting need for information to prepare her defense, outweighed any right or claim to privilege that the newsman might have which would otherwise permit him to refuse to disclose the identity of his confidential source. Judge Vickers found that even if he applied the test which was urged by Mr. Pennington, he would still arrive at the same conclusion, that is, that Mr. Pennington would be required to divulge the name of the confidential source. In spite of this finding, Mr. Pennington continued to refuse to identify the source and was thus, held in contempt. We believe that even if the court in this case finds that there is a limited privilege, that it should also find that Judge Vickers considered that possibility and still found in favor of disclosure of the name of the confidential informant and it should not be the place of this court to overrule that decision unless there was a clear abuse of discretion on the part of the court in weighing * * *.

APPENDIX "J"

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 49,268

State of Kansas, Appellee,

v.

Milda R. Sandstrom, Appellant IN RE APPLICATION OF JOE PENNINGTON.

No. 49,600

IN THE MATTER OF THE APPLICATION OF JOE PENNINGTON FOR A WRIT OF HABEAS CORPUS,

Appellant,

v.

F. T. (Jim) Chaffee, Sheriff of Shawnee County, Kansas,

Appellee.

You are hereby notified of the following action taken in the above entitled case:

Appellant's motion for Rehearing and Motion for Stay of Mandate.

Appellant's motion for Rehearing considered and DENIED.

Motion for Stay of Mandate granted until November 5, 1978.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date September 5, 1978

APPENDIX "K"

(T-18) MR. HALL: (Interrupting) I think under the facts in this case and the cases that I will cite to you, it is almost absolute, yes, Your Honor.

MR. OLANDER: Can we submit those cases that allude to those specific facts, can those be submitted to the Court rather than arguing to the Court in open?

MR. HALL: I'm entitled to make legal arguments—

THE COURT: (Interrupting) But not to prejudice the State's case or the defendant's.

MR. OLANDER: If we start getting into matters that may or may not be in the case, it will just sensationalize this trial. If we're going to argue, it ought to be in camera.

MR. HECHT: I would agree.

MR. HALL: I would agree. I would agree to an in camera argument. It's going to be tying my hands behind my back if I'm not permitted—

THE COURT: (Interrupting) All right.

(Thereupon, the on-the-record discussion had at the Bench between Court and counsel, and outside the hearing of the open Courtroom, was concluded; after which time, the following proceedings were had; to-wit:)

THE COURT: The Court will find that the matters involved in the arguments are such that they should be heard by the Court in camera, in Chambers, out of the (T-19) presence of the public generally; so we will be in recess at this time.

(Thereupon, at 1:55 p.m., this date, a further in Chambers hearing was had with all parties appearing as before, the following proceedings were had; to-wit:)

THE COURT: All right, proceed on.

MR. HALL: I was speaking about Justice White's discussion in the Branzburg case with respect to certain tests laid down by the Attorney General which covered the issuance of subpoenas to newsmen who are requested to appear before Grand Juries and who are requested to appear and testify in criminal trials.

These are set out in 28 C.F.R. 50-10; and basically, these rules laid down by the Attorney General are as follows: Number one, is there sufficient reason to believe that the information sought is essential to successful investigation, and number two, whether the government has unsuccessfully attempted to obtain the information from an alternative non-press source. These rules have directly, and indirectly, later been adopted by other Courts.

Justice Powell, in his concurring opinion in Branzburg stated: "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the * * *.

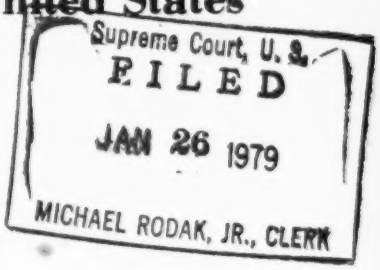
APPENDIX "L"

(T-41) (Thereupon, and on the 22nd day of November, 1977, at 1:00 p.m., a further in Chambers hearing was had in the above-entitled matter. The State of Kansas appeared by Gene M. Olander, District Attorney, Shawnee County Courthouse, Topeka, Kansas; and Mark L. Bennett, Jr., Attorney at Law, Capitol Federal Building, Topeka, Kansas. The defendant, Milda R. Sandstrom, appeared by her attorney, Robert D. Hecht, 3401 Harrison, Topeka, Kansas. Joe Grady Pennington appeared in person and with his attorney, Robert Hall, P.O. Box 1034, Wichita, Kansas. Thereupon, the following proceedings were had; to-wit:)

THE COURT: All right, we will come to order, and we're in Chambers in the matter of the State of Kansas versus Milda R. Sandstrom, No. 77-CR-546.

Let the record show that pursuant to a Motion filed by Mr. Hecht a little over a week ago on Wednesday last, a hearing was held in this Court with regard to Mr. Pennington, who was subpoenaed here to answer certain questions which were propounded to him at that time. Mr. Pennington respectfully declined to answer those questions based upon the First Amendment. Counsel had legal arguments and submitted their memoranda to me of their arguments, and I subsequently took the cases cited, and on November 17, ruled that as I saw the Kansas law, that Mr. Pennington * * *.

In the Supreme Court of the United States



OCTOBER TERM, 1978

No. 78-735

JOE PENNINGTON,
Petitioner,

vs.

STATE OF KANSAS, MILDA R. SANDSTROM, and F. T. (JIM) CHAFFEE, SHERIFF OF SHAWNEE COUNTY, KANSAS,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Frank J. Yeoman, Jr.
Assistant District Attorney
Counsel for Respondents, State of Kansas
and F. T. (Jim) Chaffee

January, 1979

INDEX

Citations

Cases

JURISDICTION

The judgment of the Kansas Supreme Court was entered July 21, 1978. A Motion for Rehearing was timely filed, but denied on September 5, 1978. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the First Amendment to the Constitution of the United States confers a conditional privilege on a television news reporter to protect the identity of a confidential informant, who gave a hearsay account of a certain witness' threat upon the life of the ultimate murder victim, where:

(a) The reporter, before the murder trial of the victim's wife, voluntarily disclosed to both the State and counsel for the defendant the entire content of the hearsay information given by the confidential informant;

(b) The State, which did not seek the name of the Informant, other than to support the defendant's request for it, acknowledges that the identity of the informant would not bear directly on the guilt or innocence of the defendant.

(c) The defendant wife, whose sole defense at trial was insanity, made no other effort to discover the identity, advanced no need for such disclosure, and declined to inquire of or cross-examine the witness as to his reported threat on the life of the decedent; and

(d) The trial court's only reason for compelling the reporter to disclose was that the defendant wife was charged "for the most serious of offenses."

2. Whether the due process clause of the Fourteenth Amendment to the Constitution of the United States prohibits the concurrent conviction and sentencing of an individual for direct criminal contempt when the contemptuous act, conviction and sentencing all occur in chambers and are closed to the public.

STATUTORY PROVISIONS INVOLVED

We do not disagree with those provisions as stated by the petitioner.

STATEMENT OF THE CASE

We do not disagree with the chronologically listed sequence of events. Additionally we would add the following:

1. That shortly after the conviction of Murder, Mr. Robert Hecht's employment by the defendant was terminated. Subsequently she retained the services of Mr. Russell Shultz, 1333 N. Broadway, Wichita, Kansas, who, to the best of our knowledge, continues to represent her.

REASONS FOR NOT GRANTING THE WRIT

(A) Petitioner Contends There Is Uncertainty Among Numerous State and Federal Courts As to When, and Under What Circumstances, a Court Should Require a News Reporter to Disclose the Identity of a Confidential News Source in a Manner Compatible With the First Amendment to the Constitution of the United States Where the Information Supplied by the Source Has Been Previously Disclosed to All Parties.

Since the decision handed down in *Branzburg v. Hayes*, 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972), at least 20 courts of appellate jurisdiction have had occasion to interpret and apply the law of that case. Apparently only two of those have concluded that a news reporter has *no* privilege under *Branzburg*. *[Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, cert. den., 434 U.S. 930 (1977); and *Dow Jones v. Superior Court*, 364 Mass. 317, 303 N.E. 2d 847 (1973).]

Kansas has followed the vast majority of courts and recognized a limited privilege for newsmen under the *Branzburg* holding.

Where no privilege was recognized *(Caldero*, supra) this court denied certiorari, Kansas' decision recognizes a privilege but just did not feel it applied to this newsman. If the finding of no privilege does not merit review we fail to see why review should be granted in a case that recognizes a privilege.

This case is markedly different than any of the three cases decided in *Branzburg*, supra. It is not that different, however, from *United States v. Liddy*, 478 F.2d 586 [D.C. Cir. 1972] except that the information was known here and the informant not known while there the informant was known but not the information.

It hardly seems that review is justified to try to make a distinction between disclosure of the name of an informant and the confidential information provided by that informant.

This is a case, where the constitutional issues pit a claimed First Amendment privilege against Sixth Amendment fair trial requirements. This case is not new in dealing with that confrontation and is not, on that ground worthy of review. [See *United States v. Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976); *United States v. Liddy*, 478 F.2d 586, 587 (D.C. Cir. 1972); *United States v. Orsini*, 424 F. Supp. 229, 232 (E.D.N.Y. 1976), aff'd 559 F.2d 1206 (2d Cir. 1977), cert. denied ____ U.S. ____, 54 L.Ed.2d 491, ____ S.Ct. ____; *United States v. Liddy*, 354 F. Supp. 208, 215 (D.C. Cir. 1972); *Rosato v. Superior Court of Fresno County*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975); *Farr v. Superior Court, County of Los Angeles*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), cert. denied 409 U.S. 1011, 34 L.Ed.2d 305, 93 S.Ct. 430 (1972); *Morgan v. State*, 337 So.2d 951, 954 (Fla. 1976); *Morgan v. State*, 325 So.2d 40, 43 (Fla. App. 1975); *People v. Marahan*, 81 Misc. 2d 637, 368 N.Y.S.2d 685 (1975).]

Petitioner asks for review because it "has been a continuing source of controversy and litigation." This may be true but review of this case is unlikely to change this. Unless this court would rule that there is no privilege at all or that there is an absolute privilege then the litigation of the subject is likely to continue regardless of any decision that might be made in this case.

(B) The Decision Below Does Not Conflict With This Court's Holding In *Branzburg v. Hayes*, supra.

The *holding* in *Branzburg* apears to be this:

Newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation, and requiring them to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment.

Obviously there is much other useful discussion and some explanation of what the case does not hold. There is no interposing of a Constitutional standard for determining what is relevant and what is not.

In this case the trial court found the information sought to be sufficiently relevant to require its disclosure. On review the Kansas Supreme Court, interpreting this to be a discovery proceeding, said:

> "The scope of discovery is to be liberally construed so as to provide the parties with information essential to litigation to insure defendant a fair trial; therefore, the scope of relevancy in a discovery proceeding is broader than the scope of relevancy at trial. Relevant evidence in discovery may include information which is not admissible at trial, but which appears to be reasonably calculated to lead to the discovery of admissible evidence."

The State does *not* concede that the evidence was not relevant at all. The State concedes only that the information sought does not bear directly on the guilt or innocence of Milda Sandstrom and is not relevant to that issue.

On the contrary, the information divulged by Mr. Pennington would lead one to believe that Mr. Winder, the State's chief witness, had possibly been engaged in a homosexual relationship with the now deceased. That an accusation had been made by him against the now deceased, Mr. Sandstrom, that Mr. Sandstrom was seeing someone else. He allegedly made a death threat against Mr. Sandstrom.

If the informant's name was known, the defendant then would have had the opportunity to find the person who heard the threat. With that he would have possibly had an opportunity to show bias, prejudice or interest of the State's chief witness. Without the informant's name the defendant could not find out who was at the party to hear of the relationship and the threat and would not be able to make such a challenge of the witness.

With this in mind it can't be said that the informant's name was completely irrelevant to the case.

(C) The Decision Below, Convicting Petitioner of Direct Criminal Contempt, does *not* Conflict With This Court's Holdings in *In Re Oliver,* 333 U.S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1947); *Cooke v. United States,* 267 U.S. 517, 69 L.Ed. 767, 45 S.Ct. 390 (1925) and *In Re Ferris,* 175 Kan. 704, rev., 348 U.S. 933, 99 L.Ed. 732, 75 S.Ct. 355 (1955).

The facts in the instant case are not remotely similar to the factual situation presented in *Oliver,* supra. In that case a unique "judge—one-man grand jury" system had led to a witness being summarily punished for contempt because the judge did not believe what he was saying. He was denied access to counsel, denied any opportunity to defend himself, or to attempt to establish the truthfulness of his testimony. Since the proceeding was a "grand jury" under Michigan law, the entire proceeding was conducted in secret. Further, the witness was denied access to any complete transcript of the proceedings. A

case entirely determined on controverted facts which witness was not allowed a fair opportunity to present his facts or challenge "facts" which had been presented by others.

In the instant case quite a different scenario is presented. A first degree murder trial was in progress. The defendant sought disclosure of certain information. A hearing was held outside the presence of the jury which necessitated its being in chambers. Petitioner was represented by counsel at all times. The Court determined, after having heard from all concerned, that the petitioner must disclose the name of his informant. The petitioner was brought back before the court where he was first given an opportunity under oath to voluntarily disclose the informant's name. He refused. The Court then directly ordered him to answer the question and give the name. Although his manner was quite respectful he openly defied the authority of the Court and refused to answer. It was then that the Court found him in contempt.

The actions of the Court and the reasons therefore were immediately public information through the press.

Oliver had not, in any way, challenged the authority of the Court. Mr. Pennington, on the other hand, was directly challenging the authority of the Court. His contemptuous act was his refusal to answer a question under oath when so ordered by the Court. There is no dispute that he did that. No fact is controverted. Only the applicable law is controverted and that would not be the proper subject of a separate hearing except on appeal which is exactly the procedure followed.

Indeed, the crux of this case is a challenge to the authority of the Court to order a newsman to divulge his confidential source. If the Court wrongly applied the law then its judgment should be reversed and Mr. Pennington freed from any punishment. If, on the other hand, the correct law was applied then his *act* was contemptuous and the punishment should be executed.

The only thing that would excuse the behavior of a witness who refused to answer a question when ordered to do so would be a legal right or privilege (such as a Constitutional privilege) to not answer, when, as here, it is questioned whether such a right exists.

CONCLUSION

For the reasons stated we believe there is no issue raised here having sufficient legal merit to justify this Court's review and request that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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